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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1932.

No. 807

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Defendants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, AND NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

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STATEMENT.

This is a suit brought by the Mississippi Valley Barge Line Company against the United States of America and the Interstate Commerce Commission, under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. Sec. 47, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 345, to set aside, annul and enjoin the enforcement of an amended order of the Interstate Commerce Commission in a proceeding arising under Paragraph (7) of Section 15 of the Interstate Commerce Act (49 U. S. C. Sec. 15 (7)), known as *Investigation & Suspension Docket No. 3814, Sugar from Gulf and South Atlantic*

Points. Paragraph (7) of Section 15, the material portion of which is found in the appendix of this brief, authorizes the Commission to enter upon a hearing concerning the lawfulness of new rates proposed by carriers, and pending such hearing and the decision thereon, to suspend the operation of the schedule naming the proposed rates, but not for a longer period than seven months beyond the time when the schedule would otherwise go into effect.

By tariff schedules filed to become effective on October 1, 1932 and later dates the railroads (among which were these interveners) serving the sugar refineries in New Orleans, Louisiana, and Savannah, Georgia, proposed to reduce their rates on sugar from New Orleans and Savannah to Chicago, Illinois, St. Louis, Missouri, points in Illinois, points on the west bank of the Mississippi River in Iowa and Missouri, points in southern Wisconsin, and points in the territory intermediate thereto, principally in western and southern Indiana and most of Kentucky and Tennessee (R. 35-36). Upon protest of appellant and others the Commission, acting upon the authority vested in it by Section 15 (7) of the Interstate Commerce Act, suspended the operation of the schedules naming these reduced rates on sugar until May 1, 1933 (R. 36).

The sugar refineries at New Orleans, while located on and served by the railroads, are also located on the Mississippi River, and can and do ship sugar from the refineries by water to ports on the Ohio and Mississippi Rivers. Sugar is shipped from Savannah by ocean and gulf to New Orleans, and thence by barges on the Mississippi River to northern ports. But the greater part of the sugar tonnage here involved originates at New Orleans (R. 36) and the rates which really concern ap-

pellant are those from New Orleans. (pp. 4 and 5 of appellant's brief.)

Until a few years ago the railroads serving these sugar refineries in New Orleans enjoyed long hauls from the origin points on practically all the sugar traffic, but now they generally receive only the hauls beyond the river-landing destinations on that part of the traffic which is not distributed therefrom by truck (R. 37).

The all-rail movement of sugar from Louisiana is now confined almost entirely to occasional, special, or emergency shipments (R. 37). The railroads serving the Louisiana refineries are hauling practically no sugar from those refineries to destinations in the territory just described. Nearly all of the Louisiana production sold in this destination territory and in contiguous territory moves by barge from these sugar refineries in New Orleans as far as St. Louis, Cairo, Peoria, Evansville, Louisville, Cincinnati and Memphis, whence it is distributed to the interior by motor trucks (R. 36).

The losses in the sugar tonnage that have been sustained by the railroads in recent years are enormous. The Commission found (R. 37) that the diversion of the sugar traffic to the barge lines in 1932 cost the Illinois Central Railroad Company, the principal carrier in this case, probably half a million dollars in revenue. This loss was due to the fact that the Illinois Central Railroad generally received on the traffic only the revenue for the hauls beyond the river-landing destinations, based on its division of the joint rates with the barge line, whereas previously it received the through charges for the long hauls from the sugar refineries to the final destinations (R. 37).

In 1932 the barge movement of sugar from Louisiana amounted to over 500,000 tons, about ten times as much

as moved all-rail from the Louisiana refineries to the same territory. Four thousand tons moved from Savannah by water to Evansville, Indiana, and Louisville, Kentucky, the sugar being transported by ocean and gulf to New Orleans and thence by river (R. 36).

By far the greater part of the water-borne traffic in sugar was carried by the Federal Barge Line, operated by the Government-owned Inland Waterways Corporation on local rates or joint rates with the delivering rail carriers. A small proportion was similarly taken by the Mississippi Valley Barge Line Company, the appellant in this proceeding, and some by the American Barge Line Company (R. 36). These three carriers, commonly known as the "standard" barge lines, operated in connection with the rail lines under certificates of public convenience and necessity issued by the Commission under Section 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended by c. 891, Sec. 2, 45 Stat. 978 (49 U. S. C. Sec. 153 (e)). This section was recently before the Court in *United States* v. *Illinois Central R. R. Co., et al.*, No. 422, October Term, 1933, decided March 5, 1934.

Under Section 3 (e) of the Inland Waterways Corporation Act, as amended, any person about to engage in conducting a common-carrier service upon certain designated waters may, upon application to the Commission, obtain a certificate of public convenience and necessity in accordance with Section 1 of the Interstate Commerce Act, and the Commission shall thereupon by order direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates and shall in such order "fix reasonable minimum differentials between the all-rail rates and joint rates in connection with said water service."

The Commission in cases which we shall later cite has entered orders requiring the rail carriers to join with these barge lines in the establishment of through routes and joint rates on numerous commodities, including sugar, and has fixed reasonable minimum differentials between the all-rail rates of the rail carriers and the joint barge and rail rates.

Barge-rail rates on sugar from New Orleans to points in the North, under these orders of the Commission, have usually been constructed by deducting from the through all-rail rate from New Orleans to the destination point an amount equivalent to 20 per cent of the all-rail rate on sugar from New Orleans to the river port reached by the barge line (R. 39). A reduction in the all-rail rate from New Orleans to the river port carried along with it a reduction in the difference between the all-rail and the rail-barge rates, which difference is usually called the barge line differential. For example, the all-rail rate on sugar from New Orleans to St. Louis which was in effect prior to the time the rates were reduced, was 50 cents. Twenty per cent of this all-rail rate of 50 cents is 10 cents, and the barge-rail rate that was formerly in effect from Chicago to Peoria, for example, was arrived at by deducting 10 cents from the all-rail rate on sugar from New Orleans to Peoria of 54 cents, making a barge-rail rate of 44 cents (R. 38, 39). These rates are exclusive of the emergency charges which were required by the Commission to be discontinued after March 31, 1933 (*The Fifteen Per Cent Case, 1931,* 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361. See *United States* v. *Louisiana,* 54 Sup. Ct. Rep. 28).

The American Barge Line, one of the so-called standard barge lines, much of whose business is merely towage service, does not have a complete system of joint

rates on sugar in connection with the rail lines, but has some arrangements of a similar nature with truck lines (R. 36). The appellant, the Mississippi Valley Barge Line Company and the American Barge Line took some sugar from New Orleans at lower rates than were charged by the Federal Barge Line. They do not adhere absolutely to this usual differential basis on all traffic. Tramp or contract barge operators obtained considerable tonnage at still lower figures (R. 36, 37).

The practice of shipping sugar in contract barges from New Orleans developed rapidly in 1932 (R. 43). At least two of the largest refineries resorted to it as a means of meeting the flood of sugar moving by water from the East and California. One refiner financed barge operations and was thus in a position to dictate the rates to be charged. This refiner seems to have had no doubt about his ability to obtain a sufficient supply of contract water craft in the future (R. 44). The railroads were apprehensive about the situation and were convinced that it required quick action (R. 44). They feared that if the tendency on the part of the sugar refiners to use contract barges was not stopped, all the refiners, to protect themselves, would use contract barges or provide their own barges for most of the traffic. Petroleum, steel and cotton interests had already entered the river transportation business to a greater or less extent (R. 44). The Commission has recently had occasion to consider the great handicaps under which the railroads labor in meeting the competition of petroleum refiners who ship petroleum in their own barges from refining points in the New Orleans-Baton Rouge district to ports on the Mississippi and Ohio Rivers (*Petroleum from New Orleans Group to Memphis*, 194 I. C. C. 31). The Commission in a recent report dealing with cotton

rates (*Rate Structure Investigation, Part 3, Cotton,* 181 I. C. C. 474) modified the orders it had theretofore entered in that proceeding so as to enable the carriers to reduce their rates on cotton to New Orleans where such action was necessary to meet the competition of trucks or barges or both.

One of the main purposes of the reductions in sugar rates proposed by these interveners and other carriers serving the refineries in New Orleans was to discourage the refineries themselves in providing their own means of transportation or patronizing operators of contract barges. The mere publication of the proposed rates had deterred one refinery from increasing its river terminal facilities (R. 44).

The tramp or contract barges transport traffic only in a port-to-port service and do not enter into through routes and joint rates with the rail carriers. These tramp and contract barges, are therefore subject to no regulation whatever with respect to their rates. The so-called standard barge lines that join in through routes and joint rates with the rail carriers are subject to the Interstate Commerce Act in so far as these joint rates are concerned. But their port-to-port rates are not subject to the jurisdiction of the Commission, and the port-to-port rates of both the standard barges and the contract barges may be changed at will and without previous notice, and out of these port-to-port rates the barge lines may pay rebates, give allowances, and allow special privileges (R. 25).

With these enormous losses in the sugar traffic before them, with the ever-increasing losses to both the standard barge lines and the contract barge lines, with the rapidly developing practice of the refiners in shipping sugar in contract barges, and with their experience with

contract barges in the petroleum, steel, and cotton industries, the rail carriers were confronted with the question as to what action they should take in order to prevent any further losses in their sugar traffic and to regain some part at least of the traffic that they had lost in the last few years.

The rates on sugar from New Orleans, as well as other sugar refineries in the United States represented a compromise on the part of the principal shippers and rail carriers following the Commission's decision in the *Sugar Cases of 1922*, 81 I. C. C. 448, which had stood without substantial modification for about 10 years (R. 21). But there could be no doubt that their rates were on too high a level to meet the competition of the new and powerful competitive agencies of transportation in the form of water and truck carriers that maintained much lower rates than the rates of the rail carriers (R. 21).

The rail carriers could not complain of the level of the port-to-port rates of the water carriers, or of the rates of the truck carriers, for their rates are subject to no regulations and could be changed at will.

There was no regulatory body that had the power to fix minimum rates for the port-to-port service of the water carriers or for the service of the truck carriers. The report of March 10, 1934, of the Federal Coordinator of Transportation respecting the regulation of water and motor carriers portrays the demoralization that characterizes the operations of the motor and water carriers today and the cut-throat competition in which they engage as a result of the absence of any control over their rates.

The differentials between the all-rail rates and the barge-rail rates were much too wide from a competitive-

service standpoint, for the standard barge lines were taking the most of the traffic (R. 45). The only possible way, therefore, of reducing the differential and thus narrowing the spread between the all-rail rates and the barge-rail rates, was to reduce the rail rates themselves, and this the carriers serving the refineries at New Orleans proposed to do.

The carriers serving the refineries in New Orleans proposed two separate bases of rates, one subject to an 80,000 pound minimum per car, and the other, on a somewhat higher level, subject to a 60,000 pound minimum per car (R. 37). Protests against the proposed rates were, as stated, filed with the Commission by the appellant and other parties, and the schedules naming the proposed rates were suspended by the Commission (R. 36). A hearing was held before the Commission on October 25-November 3, 1933, at which the appellant and other protestants appeared and offered testimony in opposition to the proposed rates. The Commission handed down its decision on July 3, 1933. It found that the carriers had amply justified the rates proposed by them from New Orleans based upon a minimum weight of 60,000 pounds per car (R. 49). The Commission found, however, that the proposed rates based upon a minimum weight of 80,000 pounds per car were somewhat lower than the necessities of the situation required, but further found that the carriers had justified rates 4 cents higher (R. 50).

What may be said to be the key rates in the adjustment of sugar rates from New Orleans are those to Chicago and St. Louis, and we set forth below a statement which shows the rates on sugar from New Orleans to Chicago and St. Louis that were formerly in effect, the rates based upon a minimum weight of 80,000 pounds

per car, proposed by the rail carriers, the rates suggested before the Commission by appellant, and the rates which the Commission found justified. The rates which really concern appellant and of which it complains are those based upon a minimum weight of 80,000 pounds per car.

From	To	Former Rates (Cents)	Rates Proposed by Rail Carriers (Cents)	Rates Proposed by the Appellant (Cents)	Rates Found Justified by the Commission (Cents)
New Orleans	Chicago	56	30	40	34
New Orleans	St. Louis	52	28	38	32

Appellant set out in its brief (p. 5) a similar statement but omitted the reduced rates actually suggested by it before the Commission.

The Commission entered an amended order on July 18, 1933 (R. 67) in which it vacated its order of suspension theretofore entered, so far as it related to rates based upon a minimum weight of 60,000 pounds, but further ordered the carriers to cancel such of their schedules as named rates based upon a minimum weight of 80,000 pounds. The order of the Commission did not require the establishment or maintenance by the railroads, including these interveners, of any rates whatsoever.

Appellant on or about July 25, 1933, filed with the Commission a motion for rehearing (R. 143) which motion was denied by the Commission on August 3, 1933 (R. 143). The appellant then brought suit in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri to set aside and annul the order of the Commission in this proceeding. The Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, the Southern Railway Company, the Cincinnati, New Orleans & Texas Pacific

Railway Company, the Alabama Great Southern Railroad Company and the New Orleans-Northeastern Railroad Company intervened in that proceeding in accordance with the provisions of Section 212 of the Judicial Code (28 U. S. C., Sec. 45a), each one of these railroads having been a party in interest to the proceeding before the Commission (R. 81).

The United States District Court in a memorandum opinion of October 13, 1933, *Mississippi Barge Line Co. v. United States et al.* (Illinois Central Railroad Company *et al.*, Interveners), 4 Fed. Supp. 745 (R. 93), reached the conclusion that the defendants and interveners were entitled to a decree dismissing the bill of complaint, and such a decree was entered on November 21, 1933 (R. 107). It was from that decree that the appellant appealed direct to this court.

The Commission considered at the time it considered the case now before this court, I. & S. Docket No. 3814, *Sugar from Gulf and South Atlantic Points,* four other cases dealing with the rates on sugar: I. & S. Docket No. 3829, *Sugar from Eastern Points to Central Territory*; I. & S. Docket No. 3837, *Sugar from New Orleans to Arkansas Missouri and Oklahoma;* Fourth Section Application No. 14080, *Transcontinental Eastbound Sugar,* and Fourth Section Application No. 14816, *Reduced Rates on Sugar from Colorado, Nebraska, Wyoming and Other States to Illinois Territory.*

The Commission dealt separately in its decision with each of these five cases. The case now before this court, however, involves only the decision and order of the Commission in I. & S. Docket No. 3814, *Sugar from Gulf and South Atlantic Points.*

The Commission in referring to these five cases made

this statement in the very first paragraph of its decision (R. 21):

> "These five cases represent collectively a contest among railroad, water, and motor-truck carriers for that great volume of carload sugar traffic which moves from Atlantic and Pacific coast and Louisiana cane-sugar refining points and from interior beet-sugar manufacturing points to central territory and certain middle western points, and particularly to Chicago, Ill., the country's largest market. They, of course, involve indirectly business strife among sugar interests having plants at competing origin points. In the main they embrace the same traffic as *Sugar Cases of 1922*, 81 I. C. C. 448, out of which came a general readjustment of the all-rail sugar rates, representing a compromise on the part of the principal shippers and rail carriers, which has stood without substantial modification for about 10 years. However, conditions have now materially changed. Into the transportation field have lately come new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers. They have made serious inroads on the traffic of the latter carriers and are threatening soon to take still more of it. To cope with the situation the respective sets of rail carriers serving the origin groups mentioned are here seeking, independently of each other, drastic, sweeping, and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent."

SUMMARY OF ARGUMENT.

I.

Appellant neither makes nor receives shipments of sugar. It pays no freight charges thereon. The rates dealt with by the Commission in its decision were not appellant's rates but the all-rail rates of the rail carriers. Neither the findings nor the order of the Commission required any action on the part of appellant. Appellant filed a protest against the proposed reductions in the rates and offered testimony in opposition thereto at the hearing before the Commission, but this did not entitle appellant to institute an independent suit to set aside the Commission's order in the absence of threatened or actual legal injury. Appellant may have sustained a competitive disadvantage as a result of the establishment by the rail carriers of the reduced rates which the Commission found would not be unlawful, but this did not invade any legal right of the appellant, or cause it to suffer any legal injury. Appellant had therefore no legal right to maintain an independent suit to set aside an order not directed at it and requiring no action on its part (*Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, p. 486; *Moffat Tunnel League* v. *United States*, 289 U. S. 113; *Sprunt & Son* v. *United States*, 281 U. S. 249).

II.

These intervening rail carriers are not seeking in this proceeding or in any other to set aside the order of the Commission in this case (R. 67), an order that does not require the carriers to establish or change any rates

whatsoever. The carriers, had they chosen to do so, could have continued in effect the previously existing rates on sugar from New Orleans to points in the North. Exercising the choice which they had, they made effective reduced rates which were no lower than the reasonable minimum rates which the Commission found had been justified. The rates now in effect, therefore, were published by the carriers as a result of their voluntary action and may be changed only after a hearing. A judgment in appellant's favor under these circumstances would be futile, for it would not restore appellant to the advantage it previously enjoyed. The case presented by appellant to this Court has become moot (*Sprunt & Son* v. *United States*, 281 U. S. 249, p. 257; *United States* v. *Anchor Coal Co.* 279 U. S. 812). Appellant is relegated to such rights as it has under Section 13 (1) and Section 15 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 13 (1) and Sec. 15 (1)), to file a complaint attacking the existing voluntarily established rates of the rail carriers.

III.

The Commission's order in this case did not require the carriers to establish any rates or to maintain them for any specific length of time. The order of the Commission merely carried out certain findings of the Commission with respect to the proposed rates, which findings were to the effect that certain rates would not be unlawful. Thus the findings and order of the Commission are negative in substance and may not under well established principles be judicially reviewed in any court. (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457; *Lehigh Valley R. R. Co.* v. *United States*, 223 U. S.

412.) Mere findings by the Commission in its decision that the carriers had justified certain rates may not be reviewed by any court, and for the Court to take jurisdiction of this case would, to use the language in *Alton Railroad Co.* v. *United States*, 287 U. S. 229 (p. 238), be tantamount to the usurpation by the Court of the Commission's functions. What appellant asks this Court to do is to fix reasonable minimum rates that are higher than the reasonable minimum rates fixed by the Commission.

IV.

Rail carriers have the power under the Interstate Commerce Act as it now reads, which they originally possessed, to initiate rates, that is, to fix rates, or to increase or reduce them, to adopt such a policy of rate-making as to them seems wise, to fix their rates to meet the competition of other carriers, provided only that such rates are not in violation of the Interstate Commerce Act (*Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, p. 564; *United States* v. *Ill. Cent. R. R. Co.*, 263 U. S. 515, 521; *Texas & Pacific R. R. Co.* v. *United States*, 289 U. S. 627, p. 636). The Commission itself holds that carriers may properly make rates to meet competitive conditions so long as the rates are not unduly low, do not burden other traffic, and do not give rise to unjust discrimination, undue preference or prejudice, that is to say, do not violate some provision of the Act (*Cottonseed Products to Port Arthur*, 38 I. C. C. 378; *Vinegar Rates from Pacific Coast*, 81 I. C. C. 666; *Galveston Commercial Assn.* v. *G. H. & S. A. Ry. Co.*, 128 I. C. C. 349; *Iron and Steel Articles from the South*, 176 I. C. C. 345).

The duty of determining the question of how far rail

carriers may go in reducing rates and whether reduced rates proposed by them are unlawful in any respect has been entrusted by Congress to the Interstate Commerce Commission, and the Commission considered in this case whether the rates proposed by the rail carriers would violate some provision of the Interstate Commerce Act. It found that certain of the rates proposed by the carriers were lower than the necessities of the situation required, but that the carriers had justified rates 4c higher (R. 49).

V.

The Commission reached the conclusion (R. 49) that there could be no reasonable doubt that the proposed rates were high enough to pay more than the cost of the service, and in support of this conclusion the Commission set out (R. 49) numerous findings of fact based upon the evidence before it. The evidence before the Commission is not a part of the record before this Court and the Court must therefore accept the findings of the Commission as conclusive (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 262 U. S. 318, p. 324; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114, p. 116; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, p. 125).

The Commission did not find that the proposed rates were merely sufficient to pay the out-of-pocket cost, but found that they were high enough to pay more than the cost of the service, that is to say, the full cost attributable to the traffic. The Commission found furthermore that the traffic considered would be principally added tonnage that could probably be carried at far lower costs (R. 49).

The Commission found that the carriers had not justi-

fied the proposed rates so far as those rates were based upon a minimum weight of 80,000 pounds, but had justified rates 4c higher, the effect of which was to increase the earnings under the rates that the Commission had found justified. Thus the rates which the carriers actually published are indubitably high enough to pay far more than the cost of the service, and are compensatory.

Appellant proceeds on the theory that it may try out *de novo* before this Court, but without the record upon which the Commission acted, the question whether the rates found justified by the Commission are reasonable and compensatory. The facts referred to by the ~~Commission~~ appellant, some of which are in the record before this Court and many of which are not, might well be submitted to the Commission for its consideration, and many of them were. It is established, however, that this Court will not consider the expediency or wisdom of the Commission's order or whether on like testimony it would have made a similar rule, that to consider the weight of the evidence is beyond the province of the Court.

The question whether the proposed rates would be reasonable and compensatory was one to be determined by the Commission, upon evidence and after a hearing. It was so determined and may not under the circumstances here present now be questioned.

VI.

The Commission's findings and order do not sanction a violation of Section 500 of the Transportation Act of 1920, which section declares it to be the policy of Congress to promote, encourage and develop water transportation and to foster and preserve in full vigor both rail and water transportation. Section 500 is merely a

declaration of policy on the part of Congress. It lays down no standard by which the Commission may determine the lawfulness of freight rates. What rates are legal is determined by the Interstate Commerce Act (*Keogh* v. *Chicago & North Western Ry. Co.*, 260 U. S. 156 (p. 162)). Section 500 of the Transportation Act does not purport to make any change in the existing law, to make unlawful any rate that is lawful under the existing law, but on the contrary leaves the validity of the rate to be tested by that law, that is, the Interstate Commerce Act (*Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658).

Even if it be conceded that the Commission is required to apply and give effect to the declaration of policy contained in Section 500, the Commission's decision shows that in passing upon the issues before it the Commission had in mind this declaration of policy and construed and applied the Interstate Commerce Act in the light of that declaration, that what it sought to do, to use its language in a recent case (*Ex-River Coal from Colona, Pa., to Youngstown, Ohio*, 197 I. C. C. 617, p. 633) was to carry out as the agent of Congress the policy expressed in Section 500 consistent with existing law.

Appellant itself conceded at the hearing before the Commission that the all-rail rates from New Orleans were too high and it proposed substantial reductions in those rates. The carriers all likewise proposed substantial reductions in those rates, and the question before the Commission was whether the rates proposed by appellant or by the rail carriers should be fixed as reasonable minimum rates. The Commission in passing upon this question gave consideration, as the decision shows, to the cost of transportation by water, the incidental

charges connected with such transportation, how much more rail service is worth in actual practice than water service, the effect of the then-existing rates upon the division of the sugar tonnage between the rail lines on the one hand and the barge lines on the other, and sought to fix a reasonable minimum rate for the rail carriers that would result in a just and reasonable relationship between the rail rates and the rates of the barge lines, that would moreover reflect the superior service inherent in rail transportation, and that would at the same time give the all-rail routes an equality of opportunity with the water routes.

The question of what would be reasonable minimum rates is under the Interstate Commerce Act one of the matters left by Congress to the administrative "tribunal appointed by law and informed by experience" (*Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 205 U. S. 441, p.454). This issue was decided by the Commission in this case following a full and fair hearing at which appellant appeared and offered testimony in support of its contentions,

VII.

The Commission's decision does not sanction a violation of the Anti-Trust Laws. The Commission made no finding in its decision that the carriers proposing the reduced rates had violated the Anti-Trust Laws. The Commission had not the power, and had no occasion to consider that question. This was not the issue before the Commission. The lawfulness of freight rates is determined not by the Anti-Trust Act, but by the Interstate Commerce Act (*Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, 162). Only the United States can sue to enjoin,

for an alleged violation of the Anti-Trust Laws, a combination of common carriers subject to the provisions of the Interstate Commerce Act, with respect to a matter within the jurisdiction of the Interstate Commerce Commission (15 U. S. C. Sec. 26, *Central Transfer Co.* v. *Terminal R. R.*, 288 U. S. 469).

VIII.

The Commission's decision does not sanction a violation of Section 3 (1) of the Interstate Commerce Act (49 U. S. C., Sec. 3 (1)). The Commission's decision shows (R. 47, 48, 49) that the Commission in passing upon the issues before it considered whether the rates proposed by the rail carriers would violate Section 3, but found that they would not. Every rate which gives a preference to certain persons, commodities, localities or traffic is discriminatory, but such discrimination is not necessarily unlawful. Section 3 prohibits only that discrimination which is unreasonable, undue, or unjust, and whether a preference or discrimination is undue, unreasonable or unjust is one of the questions of fact that has been confided by Congress to the judgment of the Commission (*N. C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318, 322.)

Appellant does not contend that the reduced rates on sugar that have been published by the rail carriers from New Orleans to points in the North are unjustly discriminatory against it, or are unduly prejudicial to it. Appellant can make no such claim, for it does not ship or receive sugar and pays no freight charges on shipments of sugar. Its contention is hardly more than a suggestion that shippers, refiners and purchasers of sugar who are not before this court and who did not complain before the Commission, may file a complaint al-

leging a violation of Section 3. The court will not listen to a party who complains of a grievance that is not his (*Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88).

IX.

The Commission's decision does not sanction a violation of Section 4 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 4 (1)). The Commission made no finding that under the sugar rate adjustment proposed by the carriers there would be a violation of Section 4. The carriers proposing the reduced rates from New Orleans did not seek relief from this section, and the Commission itself pointed out (R. 43) that the carriers explained that the proposed rates from the South to the water competitive points were blanketed back to the interior, among other reasons, because of the uncertainties and difficulties attending applications for fourth section relief. Appellants sought to prove that a fourth section departure exists in the rates from New Orleans (R. 143). This was disputed by interveners (R. 160). Not all departures from Section 4 are unlawful. Under that section the Commission has the power to authorize the carriers to charge less for a longer than for a shorter distance. (*Intermountain Rate Cases*, 234 U. S. 476, 485.)

If the appellant believes there are fourth section departures in the adjustment that have not been authorized by the Commission, the appellants should call the Commission's attention to those departures. This is not a question that affects the appellant in any way, or one which gives it any right to complain in such proceeding as the present one.

X.

The denial by the Commission of appellant's motion for a rehearing was not a denial of a right guaranteed by law. The Commission's report and order in this case were handed down on July 3, 1933 (R. 19). Appellant waited until after it had received the Commission's report and order before filing, on or about July 25, 1933 (R. 142), its motion for a rehearing in which it set out alleged changes in conditions. Appellant never contended that the alleged changes in conditions arose only after the date of the Commission's decision, July 3, 1933.

The case does not come within the principle announced in *A. T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, the Western Grain Case, but rather the more recent decision in *United States* v. *Northern Pacific Co.*, 288 U. S. 490, in which this Court held that if the situation had changed since the date of the hearing, it was incumbent upon the appellant to bring the alleged change in conditions at once to the Commission's attention without waiting for the decision of the Commission.

Wholly aside from this point, however, appellant's motion for a rehearing showed on its face that the Commission was amply justified in denying it.

ARGUMENT.

APPELLANT HAS NOT BEEN SUBJECTED TO ANY LEGAL WRONG BY THE COMMISSION'S ORDER AND HAD THEREFORE NO LEGAL RIGHT TO INSTITUTE THIS SUIT.

At the very threshold of this case we are confronted with the question whether appellant has been subjected to any legal wrong by the Commission's order and whether it had the legal right to institute this suit. A review of the facts and the law will show that appellant has no legal right or interest that will be injuriously affected by the order in this case.

Appellant is a water carrier operating a line of towboats and barges on the Mississippi and Ohio Rivers (R. 2). It transports as a common carrier freight in interstate and foreign commerce between New Orleans, Louisiana, Cincinnati, Ohio, St. Louis, Missouri, and intermediate ports (R. 2).

Appellant is neither a shipper nor a receiver of shipments of sugar. It pays no freight charges on such shipments. The rates considered by the Commission in its decision in this case were not the rates of appellant. They were the all-rail rates of the rail carriers from New Orleans to points in the North. Neither the findings nor the order of the Commission require any action on the part of appellant.

Barge-rail rates on sugar from New Orleans to points in the North as heretofore stated are usually constructed by deducting from the through all-rail rate from New Orleans to the destination point an amount equivalent to 20 per cent of the all-rail rate on sugar from New Orleans to the river ports reached by the barge line (R. 39).

While, as stated, this has been the general basis for the construction of barge and rail rates (*Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers*, 153 I. C. C. 129, p. 132; *Application of Mississippi Valley Barge Line Company, Ex Parte No. 99*, 167 I. C. C. 41, p. 45; *Application of American Barge Line Company, Ex Parte No. 102*, 188 I. C. C. 521, p. 526), these barge lines, including appellant, may, if they desire to do so, maintain the same rates as the rail carriers or maintain rates that reflect smaller differences between the all-rail rates and the barge-rail rates than the differences that would result if the 20 per cent basis, the usual basis, were followed.

The Commission pointed out in its decision (R. 37) that these barge lines, including appellant, do not adhere absolutely to the usual differential basis on all traffic. The mere fact, therefore, that the rail carriers reduced their all-rail rates did not require appellant or any other barge line to make any reductions in either its port-to-port rates or its barge-rail rates. Indeed, the barge lines, including appellant, in so far as their port-to-port traffic is concerned, are subject to no regulation whatever, and may make whatever port-to-port rates they choose.

The amended order of the Commission in this case (R. 67) dealt with the all-rail rates only. It was not addressed to and required no change in any rate of appellant. And the fact that the rail carriers established on their own volition and without a mandatory order on the part of the Commission the rates which the Commission found in its decision they had justified for application on sugar from New Orleans to destinations in the North, likewise did not require any change in the rates of appellant. The questi in any case whether appel-

lant should reduce its port-to-port rates or its barge-rail rates, following reductions made in the all-rail rates by the rail carriers, is one for the determination of appellant alone.

Appellant had the right to file a protest with the Commission against the reduced rates on sugar proposed by the rail carriers from New Orleans to points in the North. It filed such a protest (R. 2). When the Commission, following the protests made by appellant and others against the proposed sugar rates, suspended those rates pursuant to the authority vested in he Commission by Section 15 (7) of the Interstate Commerce Act (49 U. S. C., Sec. 15 (7)), appellant had the right to appear and offer testimony before the Commission in opposition to the proposed rates, which it did, and the Commission's decision deals at length with the testimony offered by appellant (R. 32, 39, 40, 41, 42, 45, 46, 48). But does the fact that appellant appeared before the Commission, as it had a right to do under Section 15 (7) of the Interstate Commerce Act, and offered testimony, give it the right to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened injury to it? The answer is found in the decisions of this Court.

In *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, this Court had before it a suit to set aside an order of the Commission granting a certificate of public convenience and necessity to the Wheeling & Lake Erie Railway Company, of which the Pittsburgh & West Virginia was a minority stockholder. This Court said in part (p. 486):

> "The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and

> —because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it. *Sprunt & Son* v. *United States*, 281 U. S. 249. * * *"

In the more recent case of *Moffat Tunnel League* v. *United States*, 289 U. S. 113, the court had before it a suit by the League against the United States, the Interstate Commerce Commission, and the Denver & Rio Grande Western Railroad Company, to set aside an order of the Commission authorizing that company by stock purchase to acquire control of the Denver & Salt Lake Railroad Company, called the Moffat Road. This Court said (p. 119) that the Act providing for the institution of suits to set aside an order of the Commission does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for the setting aside of an order, but that it does require that the petition shall set forth "the facts constituting petitioner's cause of action" and by other provisions shows that for failure to do so the suit shall be dismissed (Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. Sec. 45). The Court further said that consequently the complaint must show that the plaintiff has or represents others having a legal right or interest that will be injuriously affected by the order, citing *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, p. 148; *Sprunt & Son* v. *United States*, 281 U. S. 249, p. 254; *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, p. 486.

In *Sprunt & Son* v. *United States*, 281 U. S. 249, this Court had before it the validity of an order of the Interstate Commerce Commission requiring certain carriers

to remove, in a manner prescribed in the order, undue preference and prejudice caused by their rates on cotton from interior points to ports on the Gulf of Mexico. The Commission found that the adjustment of rates unduly preferred Sprunt & Son and described the manner in which the undue preference should be removed. Sprunt & Son brought suit to enjoin the enforcement of the order. Another suit was brought by the rail carriers to enjoin the enforcement of the order. Upon final hearing the District Court sustained the validity of the order and entered a decree dismissing the bill. None of the carriers appealed from the decree.

This Court, after referring to the interest that Sprunt & Son had in the controversy, an interest that entitled them to intervene in the administrative proceeding before the Commission, said in part (p. 255):

> "* * * And if they (Sprunt & Son) did so, they became entitled under Section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled, as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. * * *"

Continuing, this Court said (p. 256):

> "Appellant's present position resembles in all es-

sentials one which was put forward in *Edw. Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, 147, 148, 68 L. Ed. 216, 220, 221, 44 Sup. Ct. Rep. 72, and *United States* v. *Merchants & Mfrs. Traffic Assn.* 242 U. S. 178, 188, 61 L. Ed. 233, 239, 37 Sup. Ct. Rep. 24. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. * ** *"

It cannot be, therefore, that when the Commission has found that rates proposed by rail carriers violate no provisions of the Interstate Commerce Act, or that when the Commission has found that rates somewhat higher than the rates proposed by the rail carriers would not violate that Act, and when the rail lines accept those rates, a barge line such as appellant can have any legal right to maintain an independent suit to set aside an order which in fact did not require the rail carriers to publish any rates, but merely left the rail carriers free to publish certain rates if they chose to do so, and which order, moreover, was not directed to barge lines and required nothing whatever of them.

If the rates which the carriers published following the decision of the Commission in this case are not in violation of the Interstate Commerce Act, and the Commission has so found, no legal right of appellant was invaded by their establishment.

Appellant says (p. 84) that it readily concedes that the removal of a competitive advantage, or even the diminution of a competitive equality, to which a party has no legal right, does not give that party any standing in court, and that no legal right in such a case has been invaded and therefore no legal damage has been suffered. But appellant goes on to say that this is very different

from appellant's situation, that appellant has suffered legal damage by virtue of the invasion of a legal right to a continued existence.

And appellant in seeking to distinguish the *Sprunt Case* from its situation (p. 82), while admitting that Sprunt's legal right was the right to a rate not unduly prejudicial, says that its position is precisely the opposite, that it alleges and shows that the existing rates violate its legal right granted by Section 500 of the Transportation Act, 1920, to continue its existence as a water carrier.

The Interstate Commerce Act does not guarantee to the rail carriers a legal right to a continued existence. That Act is not a guarantee that rail operations will be profitable, or that rail carriers will be given immunity from competition by other agencies of transportation and will be protected from such competition. The large number of railroads now in the hands of receivers shows that these railroads were not given by the Interstate Commerce Act "a legal right to a continued existence," to use the language of the appellant. Section 500 does not guarantee to the appellant a legal right to a continued existence, nor does it guarantee to the appellant an immunity from competition.

The Commission in its last annual report again had occasion to refer to the ever-increasing diversions of traffic from the railroads to the competing agencies of transportation, including these barge lines. The Commission said (47th Annual Report, December 1, 1933):

> "We have had occasion in previous reports to point out that the financial difficulties of the railways are the result of more than one cause. In large part they are the reflection of the reduction in traffic that came with the economic depression but also in considerable part they result from the competition of other transport agencies. * * *" (P. 1).

> "An outstanding feature of the evidence is with respect to the already great and constantly increasing diversions of traffic from the railroads to motor trucks and to boats and barges, particularly to the trucks. These diversions have now attained such proportions and threaten such further expansions as to constitute a serious menace to the future integrity of the railroads." * * * (p. 8).

To paraphrase the language of this Court in the *Sprunt Case*, the fact that appellant may be deprived of a competitive advantage that it has enjoyed by reason of the substantial differences between the all-rail rates and the barge rates, differences that have been so great that the sugar traffic has been driven from the rail carriers, does not subject appellant to any legal wrong.

In *Pennsylvania Railroad Co. v. United States*, 40 Fed. 921, the Pennsylvania Railroad Company sought to set aside an order of the Commission granting a certificate of public convenience and necessity to the Pittsburgh & West Virginia Railway Company to construct a branch line of railroad to a point served exclusively by the Pennsylvania. The court said in part (p. 924):

> "True the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits for handling all the traffic flowing in and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it is found somewhere in the law written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve the community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920,—does not explicitly or implicitly accord a noncompetitive traffic area to the first taker as a law accords a trade-mark to the first adopter. Instead of doing this the writen law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another upon a showing of convenience

and necessity of more transportation service for those inside reaching out and those outside reaching in. Where, as here, the showing is lawfully made that the Commission has validly acted, the carrier at whose expense the change is wrought has had no legal right invaded and has suffered no legal injury."

THE CASE NOW BEFORE THIS COURT HAS BECOME MOOT.

The Commission's order in this case (R. 67) shows on its face that it does not require the carriers to establish any rates whatever. It will be recalled that the Commission found in its decision (R. 49) that the record afforded ample justification for the proposed rates that were based upon a minimum weight of 60,000 pounds per car, that the respondent carriers had not justified the proposed rates based upon a minimum weight of 80,000 pounds per car, but that they had justified rates 4c higher.

The Commission carrying out the findings that it made in its decision, ordered (R. 67) that the order previously entered in the proceeding suspending the operation of the tariffs, be vacated in so far as it related to rates based on a minimum weight of 60,000 pounds. The order further required the carriers to cancel their schedules naming rates based on a minimum of 80,000 pounds.

It is plain that under this order the carriers, had they chosen to do so, could have continued in effect the then existing rates on sugar from New Orleans to points in the North, for there was no requirement in the order that made it mandatory upon the carriers to change any of their then existing rates on sugar.

The effect of the Commission's report and order was to enable the carriers, if they decided to do so, to reduce their rates to a level not lower than that found justified by the Commission in its decision. Reduced rates on

sugar from New Orleans not lower than the rates that the Commission in its findings found that the carriers had justified (R. 49, 50) were published by the carriers and are now in effect from New Orleans (R. 14).

The rates now in effect having been published by the carriers as a result of the voluntary action of the carriers, and not pursuant to any order of the Commission requiring the establishment and maintenance until the further order of the Commission of such rates, the case presented by appellant to this Court has become moot. Even if the Commission's order were set aside, it would leave unaffected the right of the rail carriers to continue the maintenance of the present rates, for the order does not require the maintenance of any specific rates as maximum rates. The carriers are free, so far as this order of the Commission is concerned, to continue the present rates, to propose increases in those rates or reductions. Any tariff schedules naming changes, either in the way of increases or reductions, would of course be subject to the power of the Commission under Section 15 (7) of the Interstate Commerce Act (49 U. S. C., Sec. 15 (7)), to suspend such schedules and to enter upon a hearing concerning their lawfulness.

As stated by this Court in *Sprunt & Son* v. *United States*, 281 U. S. 249 (p. 257):

> "Moreover, by the action of the carriers, the issue of undue prejudice and unjust preference, which had been passed upon by the Commission has become moot. Compare *United States* v. *Anchor Coal Co.*, 279 U. S. 812, 49 S. Ct. 262, 73 L. Ed. 971. Most of the carriers never sought to annul the order. Those that joined in the suit to set it aside have since voluntarily severed themselves from the shippers who object to it. The fact that some carriers at one time protested is of no significance, among other reasons, because their protest may have been

> directed not against that part of the order which commanded an equalization of rates, but against the particular figure at which equalization was ordered. There is nothing to show that any carrier is now in sympathy with the appellants' attack on the order. A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so."

The intervening rail carriers are not seeking in this proceeding or in any other to set aside the Commission's order. Exercising the choice which they had, they made effective the reduced rates on sugar which were no lower than the minimum rates which the Commission in its decision herein found that they had justified. A judgment in appellant's favor under the circumstances, to use the language of this Court in the case just cited, would be futile, for if would not restore the appellant to the advantage previously enjoyed. The carriers would be free to continue the present rates.

The carriers can not be required to change their voluntarily-established rates until the Commission has first found that those rates are in violation of some section of the Interstate Commerce Act, and then only after a hearing. Under the circumstances here present, the case becomes moot, and the appellant is relegated to such rights as it has under Sections 13 (1) and 15 (1) of the Interstate Commerce Act (49 U. S. Sec. 13 (1) and Sec. 15 (1)), to file a complaint attacking the existing voluntarily-established rates of the rail carriers, if it believes that under present conditions these rates are unlawful in any respect. As stated by this Court in the *Sprunt* case, 281 U. S. 249 (p. 255):

> "Why the carriers filed the new rate structure now in force is no concern of appellants. If the

> carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. * * *"

Appellant argues (p. 105) that upon an annulment of the order here complained of it would be the duty of the Commission under Section 15 (1) of the Interstate Commerce Act (49 U. S. C., Sec. 15 (1)), to exercise the initiative that the Commission has of instituting an investigation and of effecting a change in the rates. This section, as shown by the quotation that appellant has made from it, authorizes the Commission to prescribe rates only after a hearing, and on the theory here advanced by appellant the rates now in effect could not be changed by the Commission in the absence of a hearing.

Appellant goes on to say (p. 106):

> "Even assuming, however, that the Commission would have no duty and no power upon its own initiative to take action in regard to these rates, the question still is not moot. Upon annulment of the present orders, appellant, or anyone similarly situated, could file a complaint before the Commission, and the Commission, in acting upon said complaint, would be bound by the principles announced by this Court in its order of annulment. * * *"

Appellant here gives away its case, and proves that the case now before this Court is moot. Appellant can file a complaint with the Commission at the present time attacking the existing rates, without awaiting a decision of this Court. What appellant really seeks is an opinion of this Court that will direct the Commission to apply in a manner prescribed by this Court the standards in the Interstate Commerce Act

which govern and control the action of the Commission. Appellant here asks the Court to weigh the facts found by the Commission, to inquire into the soundness of the reasoning by which it reached its conclusions, to question the wisdom of those conclusions, and to consider whether on like facts this Court would have made a similar ruling. Appellant, in short, asks this Court to convert itself into a rate-making body. All these things this Court has repeatedly said it will not do. (*Western Paper Makers' Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564, p. 581.) Even though this Court announced "certain principles", it would still be within the Commission's power to apply those principles. Appellant really wants a ruling by this Court that will control and fix the measure itself of the rates on sugar from New Orleans. Appellant desires a decision from this Court to the effect that the rates found not unlawful by the Commission, are in fact unlawful, and that certain other designated rates will be lawful rates.

Appellant argues that the decision in the Sprunt case is distinguishable from the case at bar (p. 108), that a decision in appellant's favor in the case at bar would impose a duty upon the Commission to reopen the case and substitute a lawful rate for the rates which this appellant seeks this Court to declare to be unlawful rates. This contention but gives further emphasis to the real aim of the appellant: to persuade this Court to fix on the findings made by the Commission minimum rates which will be somewhat higher than the minimum rates found not unlawful by the Commission in its decision in this case.

What appellant seeks is an opinion from this Court establishing principles that will shackle and control the

discretion that the Commission has on the facts in cases as they arise before the Commission. It is a clear attempt to turn this Court into a rate-making body.

And when appellant says as it does (p. 112), that the relief prayed for will enable the appellant to bring a suit in equity against the several railways not now parties, to enjoin them from continuing in effect the rates objected to, appellant simply gives further emphasis to the fact that the decision sought from this Court would be but a step in a chain of litigation which in the end can only again impose upon the Commission, but after a hearing, the duty of determining what it has already determined: what would be reasonable minimum rates on sugar for New Orleans.

THE COMMISSION'S FINDINGS AND ORDER ARE NEGATIVE IN SUBSTANCE AND ARE NOT THEREFORE JUDICIALLY REVIEWABLE.

FOR THE COURT TO TAKE JURISDICTION OF THIS CASE WOULD BE TANTAMOUNT TO THE USURPATION BY THE COURT OF THE COMMISSION'S FUNCTIONS.

The amended order in this proceeding and in the proceedings that were heard along with it (order of July 18, 1933, R. 67) contains two paragraphs that deal with the rates that were considered by the Commission in the case here before the Court, I. & S. Docket No. 3814, *Sugar From Gulf and South Atlantic Ports.*

The first paragraph merely provides that the order which the Commission had theretofore entered in I. & S. Docket No. 3814, suspending the operation of the schedules proposing reduced rates from New Orleans, be vacated and set aside effective July 9, 1933, in so far as it related to rates based on a minimum of 60,000 pounds. It will be recalled that the Commission found in its decision in this case (R. 49) that the record afforded ample

justification for the proposed rates based upon a minimum of 60,000 pounds.

The second paragraph of the amended order (R. 67) deals with the rates based upon a minimum weight of 80,000 pounds which were before the Commission in this case, I. & S. Docket No. 3814. It will be recalled that the Commission in its decision found (R. 49) that the rates proposed by the carriers, based upon a minimum weight of 80,000 pounds were somewhat lower than the necessities of the situation required and had not been justified. This particular paragraph therefore directed the carriers who had published in their schedules the reduced rates from New Orleans based upon a minimum weight of 80,000 pounds to cancel the schedules containing such rates on or before September 5, 1933.

The Commission in its decision found that the carriers had justified rates based upon a minimum weight of 80,000 pounds 4c higher than those proposed, and the Commission said (R. 50) that the order would require the cancellation of the schedules naming the rates based upon a minimum weight of 80,000 pounds, but without prejudice to the establishment of rates in conformity with its conclusions.

It will thus be observed that the Commission's order in this case did not require the carriers to establish any rates whatsoever. The order left the carriers free to determine for themselves whether they would continue the rates that had been in effect, or would avail themselves of the opportunity and choice they had under the Commission's findings of publishing reduced rates that would at least be no lower than those which the Commission found the carriers had justified.

What in substance and in the last analysis was the decision of the Commission in this case? It found that

certain rates proposed by the carriers had been justified, that is to say, would not be unlawful. It further found other rates proposed by the carriers had not been justified, but that rates 4c higher than such rates had been justified, that is to say, would not be unlawful.

These interveners submit therefore that these findings and order are negative in substance, and may not be made the subject of an appeal to the courts under principles well established in the cases which we shall later cite.

This question may also be approached from this aspect: The Commission is not required under Paragraph (7) of Section 15 of the Act (49 U. S. C. Sec. 15 (7)), to suspend every schedule naming a new rate that is filed with the Commission, whether that new rate be an increase or a reduction in the then-existing rate. Under the Rules of Practice of the Commission, interested parties, upon the filing of schedules naming new rates, are permitted to file protests against the rates, as the appellant did in the case of the rates here before this Court, and the carriers proposing the new rates are permitted to file replies thereto. The Commission then determines whether it will suspend the rates. It will not be argued that if the Commission had refused to suspend the rates that were proposed by the carriers in this case, such refusal could have been made the basis of an appeal to compel the Commission to suspend the rates. But the parties opposed to such rates would nevertheless have had the right, given to them by Sections 13 and 15 of the Act, to file a complaint with the Commission attacking the rates.

Now assume that the carriers in the first instance had proposed the very rates that the Commission in this case found justified, and that the Commission had permitted

those rates to take effect without a suspension thereof. Assume also that a complaint had been filed by appellant, attacking the lawfulness of such rates. It is clear that the Commission, in the light of its decision in this case, would have found that such rates were not unlawful. Under the principles announced in *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, the order of the Commission dismissing such a complaint could not have been reviewed by any court.

The Commission has found that the rates of these interveners now in effect are not unlawful. It follows that the rights of appellant in this proceeding can not possibly be greater than its rights in a proceeding in which it attacked before the Commission the rates now in effect, and in which proceeding the Commission found the rates not unlawful and dismissed the complaint.

The following language from the decision in *Sprunt & Son* v. *United States,* 281 U. S. 249, applies with equal force to the present proceeding (p. 255):

> "Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *United States* v. *Merchants' & Mfrs. Traffic Assn.,* 242 U. S. 178, 188, 37 S. Ct. 24, 61 L. Ed. 233; *Great Northern Ry. Co.* v. *Merchants' Elev. Co.,* 259 U. S. 285, 295, 42 S. Ct. 477, 66 L. Ed. 943. The appellants' position is legally no different from what it would have been if the carriers had filed the rates freely, pursuant to an informal suggestion of the Commission or one of its members; * * *"

It is well established that not every order of the Commission is subject to review by the court.

The classic case is that of *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. This Court had before it in that case an order of the Commission dismissing a complaint filed with the Commission by the Procter & Gamble Company in which that company charged that certain demurrage rules were repugnant to the Interstate Commerce Act. The Commission after a hearing had found that the rules complained of did not conflict with the Act and had dismissed the complaint. The Procter & Gamble Company later filed a petition in the Commerce Court in which it was charged that the Commission's order dismissing the complaint was null and void and beyond the power of the Commission, in that it sustained the validity of the demurrage rules. The United States challenged the jurisdiction of the Commerce Court to entertain the cause and moved to dismiss the petition. The Commerce Court held that it had jurisdiction of the cause and that the refusal of the Commission to afford relief was, for the purposes of the jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief. But on the merits it was decided that the Commission had rightly refused to grant the relief.

This Court said that before it came, if at all, to consider the merits, it was necessary to dispose of the question concerning the jurisdiction of the Commerce Court to entertain the petition. This Court, in holding that the order of the Commission which found that the demurrage rules were not unlawful was not judicially reviewable, said, among other things, that to construe the statute as giving the Court the power to review negative orders

"* * * would of necessity amount to a substitution

of the court for the Commission, or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against, an interpretation which would seemingly create rights hitherto non-existent and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the Act creates practically valueless. * * *" (p. 292.)

This court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, said (p. 483) that it is settled that the law does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its power, citing the Procter & Gamble case.

In *Alton Railroad Co.* v. *United States*, 287 U. S. 229, this court held that the order of the Commission there before the court was not of such a character as to be classed as a negative order, which could not be reviewed. The court in discussing the cases in which it had considered the extent to which orders of the Commission may be reviewed said in part (p. 238):

"To take jurisdiction would not be tantamount to usurpation by the court of the functions of the Commission. The court is not called upon here, as it was in *Manufacturers' Ry. Co.* v. *U. S.*, 246 U. S. 457, 483, and *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 241, to afford relief which the Commission, in the exercise of its powers, had found that the complainant was not entitled to receive. The court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission. The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law and therefore to enjoin that part of the order."

What appellant asks this Court to do is to exercise administrative authority with respect to these sugar rates, and to find that the rates which the Commission found in this proceeding the carriers had justified and were therefore not unlawful were in fact unlawful. For the Court to take jurisdiction of this proceeding would be tantamount to usurpation by the Court of the functions of the Commission.

Appellant asks this Court to set aside that portion of the Commission's order that directs the carriers to cancel the schedules naming the rates based upon a minimum weight of 80,000 pounds. We doubt whether appellant has given mature consideration to the consequences that would follow. Appellant was opposed to these rates and it was based largely upon the testimony offered by appellant that the Commission found that the carriers had not justified these rates. If this Court entered a decree, the effect of which would be to set aside this portion of the Commission's order, it would seem that the carriers would then be permitted to publish the rates proposed by them, the very thing appellant is opposed to.

What appellant really seeks to control and change by this proceeding is the finding of the Commission in its decision (R. 49, 50) that the carriers had justified rates based upon a minimum weight of 80,000 pounds per car, 4c higher than the rates originally proposed by the carriers. We know of no power in any court to compel the Commission to retract a mere finding in its decision that certain rates have been justified, nor of any provision in the law which empowers a court to prevent a carrier from publishing rates which the Commission had found justified and which the Commission has declined to suspend. No court has the power to compel carriers to

change lawfully published and established rates in the absence of a prior determination by the Interstate Commerce Commission that those rates are unlawful. The administrative discretion and powers of the Commission cannot be controlled in any such manner as appellant here seeks.

THE RAIL CARRIERS HAVE THE RIGHT TO CHANGE AND REDUCE THEIR RATES TO MEET COMPETITION, INCLUDING THE COMPETITION OF OTHER AGENCIES OF TRANSPORTATION, PROVIDED ONLY SUCH RATES ARE NOT IN VIOLATION OF INTERSTATE COMMERCE ACT.

Before considering the reasons set out by the appellant for the invalidity of the Commission's order, and particularly the alleged violation of Section 500 of the Transportation Act, we direct the Court's attention to what it has said respecting the right of a rail carrier to meet competition, to reduce its rates to meet competitive conditions, and the limitations upon this right. We do this for the reason that the appellant appears to proceed on the theory, as we shall later point out, that Section 500 of the Transportation Act, which declares it to be the policy of Congress to foster and preserve in full vigor both rail and water transportation, is a guarantee on the part of Congress that the appellant, a water transportation company, will be protected against the competition of other agencies of transportation, but that the rail lines that are subject to the Interstate Commerce Act are helpless to meet the competition of a water carrier such as the petitioner.

This Court in *Interstate Commerce Commission* v. *Chicago Great Western R. R. Co.*, 209 U. S. 108, quoted what Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 48 Fed. 37 (p. 50) that:

"Subject to the two leading prohibitions that their

> charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, . . . e act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce a[illegible] f their own situation and relation to it, and genera[illegible] to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

Continuing, this Court said (p. 119) that it follows that railroad companies in fixing their own rates may take into account competition with other carriers, provided only that the competition is genuine and not a pretense.

In other cases this Court has referred to the fact that under the Interstate Commerce Act rail carriers have the power which they originally possessed to initiate rates, that is, to fix rates, or to increase or reduce them and to adopt such a policy of rate making as to them seems wise (*Skinner & Eddy Corp* v. *United States,* 249 U. S. 557, p. 564; *United States* v. *I. C. R. R. Co.,* 263 U. S. 515, p. 521; *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, p. 636).

The Commission itself in a long line of cases has held that carriers may properly make rates to meet competitive conditions so long as the rates are not unduly low, do not burden other traffic and do not give rise to undue preference or prejudice. (*Cottonseed Products to Port Arthur,* 38 I. C. C. 378; *Vinegar Rates from Pacific Coast,* 81 I. C. C. 666; *Galveston Commercial Assn.* v. *G. H. & S. A. Ry. Co.,* 128 I. C. C. 349; *Iron and Steel Articles from the South,* 176 I. C. C. 345.) The Commission, in short, holds that carriers subject to its jurisdic-

tion may reduce their rates, provided the reduced rates do not violate some provision of the Interstate Commerce Act.

The question then arises as to who is to decide how far rail carriers may go in reducing rates, and whether reduced rates proposed by them are unlawful in any respect. The duty of determining these questions has been entrusted by Congress to the Interstate Commerce Commission.

The appellant here asks this Court, in the absence of the record before the Commission and the facts which the Commission had before it, to determine that rates which the Commission has found were not unlawful, are in fact unlawful. The argument made by appellant in its brief was essentially one that should be addressed to the rate-making body.

It will now be our purpose to consider the reasons urged by appellant in support of its contentions that the order here assailed is unlawful. We shall in doing so point out that the Commission considered at length the question whether the rates would violate any provision of the Interstate Commerce Act.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF SECTION 1. THE FINDINGS OF THE COMMISSION IN ITS REPORT AMPLY SUSTAIN THE CONCLUSION THAT THE PROPOSED RATES ON SUGAR FROM NEW ORLEANS TO DESTINATIONS IN THE NORTH WERE NOT UNREASONABLY LOW.

The Commission in its decision found with respect to the rates proposed from New Orleans that there could be no reasonable doubt that they were high enough to pay more than the cost of service (R. 49). The District Court in its finding of fact found (R. 102) that the Commission had found that the rates which it approved would

be compensatory, the court quoting the facts which the Commission set out in its decision in support of this finding (R. 102-102). These facts are (R. 49):

(1) The earnings would compare favorably with those of the eastern lines under the reduced rates from refineries on the Atlantic Coast to points in the Central West proposed by the Eastern carriers and considered by the Commission in an earlier portion of its decision. (R. 23-35).

(2) The Commission found these facts respecting the earnings under the reduced rates proposed by the Eastern carriers from refineries on the Atlantic Seaboard (R. 35):

> "No question can fairly be raised as to the proposed rates being high enough to yield considerably more than the cost of the service. They are not in the lower reaches of the scale. Sugar loads heavily, and it can probably be used to fill cars that would otherwise move west empty. The earnings on a normal shipment, about 50,000 pounds, at the (fol. 45) proposed rates from and to the principal points would range from about $145 to $210 for hauls ranging from about 500 to 900 miles. They would compare favorably with those under many rates prescribed by us on other commodities."

(3) The earnings under the rates proposed from New Orleans would generally accrue from single-line straight away water-level hauls by economically and efficiently operated carriers in a territory of high traffic density.

(4) The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240.00 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26c. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15c per car mile and 6 mills per ton mile.

(5) The traffic considered would be principally added tonnage that could probably be carried at far lower costs.

(6) Many commodities are handled by the respondents at much lower charges than they here propose for sugar.

We direct attention at this point to these numerous findings of fact on the part of the Commission that support the Commission's conclusion (R. 49) that the rates proposed by the railroads from New Orleans were high enough to pay more than the cost of the service.

Appellant undertakes to summarize in its brief (p. 40) the facts stated by the Commission in its decision to support the finding that the rates are high enough to pay more than the cost of the service, but it will be observed that appellant omitted several of the findings as, for example, the specific finding that the Commission made respecting the rates from the refineries on the Atlantic Coast (R. 35), the finding that the proposed rate of 30c from New Orleans to Chicago would yield car-mile earnings of 26c, the finding that the system costs for all traffic on the Illinois Central are about 15c per car-mile, and the finding that the earnings would generally accrue for single-line straightaway water-level hauls by economically and efficiently operated railroads in a territory of high traffic density.

It will furthermore be borne in mind that the findings of the Commission (R. 49) respecting the earnings per car ($240.00), per ton mile (6.5 mills), and per car mile (26c), under the rate from New Orleans to Chicago, were all predicated upon the rate of 30c originally proposed by the carriers. But the Commission found (R. 49) that this 30-cent rate was lower than the necessities of the situation required, and found that the carriers had justified a rate 4c higher or 34c. The earnings under this

rate of 34c would be $272.00 per car, about 7.4 mills per ton per mile, and about 30c per car mile.

Appellant has wholly ignored in its argument the increased earnings under the rates on sugar from New Orleans that the Commission found the carriers had justified. If there can be no reasonable doubt that the rates as originally proposed were high enough to pay more than the cost of the service, and the Commission so found (R. 49), then the rates as increased obviously would pay substantially more than the cost of the service. The earnings per ton per mile of 7.4 mills and per car per mile of 30c under the rate of 34c found justified by the Commission for application from New York to Chicago may be compared with the system costs for all traffic on the Illinois Central Railroad of 6 mills per ton per mile and of 15c per car mile. The Commission has repeatedly said that both ton mile and car mile earnings merit consideration (*Ex-Lake Iron Ore Rates From Chicago*, 123 I. C. C. 503, p. 505; *Advances in Rates for the Transportation of Coal*, 22 I. C. C. 604, p. 620). It is significant that appellant in its consideration of the findings of the Commission and in its argument on the question of whether the rates are compensatory omits any reference to the car-mile earnings.

The Commission points out that the tonnage would be principally added tonnage that probably could be carried at far lower costs. The Commission here had reference to the well-recognized principle that additional traffic can be handled by the railroads without proportionate increases in expenses. In *New York Central R. R. Co. Acquisition of B. C. G. & R. R. Co.*, 180 I. C. C. 538, the Commission said in part (p. 557):

> " * * * Very generally additional business can be handled by railroads without proportionate increase in expenses, and there is manifestly a com-

> mercial advantage in the gain of traffic which can produce revenues in excess of actual additions to expense, or added out-of-pocket expense. This advantage is, of course, commercially valuable. * * *"

It is significant that appellant wholly fails in its argument to give any consideration to this finding of the Commission.

It was based upon these findings of fact that the Commission reached the conclusion (R. 49) that "there can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service."

The evidence before the Commission was not presented to the District Court and is not a part of the record before this Court. As stated by the District Court, 4 Fed. Supp. 745, p. 747 (R. 97), in view of the absence of the record of the evidence which the Commission had before it, the court must accept its findings as conclusive. Appellant can not contend that the order was unsupported by the evidence when the evidence upon which the Commission acted was not introduced before the court (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 262 U. S. 318, p. 324; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114, p. 116; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, p. 125).

The facts stated by the Commission in its report show that they overwhelmingly support the conclusion that the proposed rates are high enough to pay more than the cost of the service.

Appellant argues (p. 41) that there is nothing in these particular findings which contains a definite and positive statement that the rates which the Commission approved would be reasonable or compensatory. Appellant has overlooked the unequivocal finding (R. 49) that "there

can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service.

Appellant says that this is not a finding by the Commission that rates are either reasonable or compensatory, that it is a finding alone that the rates charged pay alone the out-of-pocket cost. It is plainly a finding that the rates are not unreasonably low and that they pay much more than the out-of-pocket cost, that they in fact pay more than the cost of the service. There is a substantial difference between the rates that pay more than the cost of the service, and rates that pay only the out-of-pocket cost. The Commission, when it uses the phrase "out-of-pocket costs," refers to costs that are incurred by the rail carrier for handling traffic which it would not otherwise incur were that particular traffic not handled, that is to say, the additional cost that it must incur by reason of placing that traffic in the train. (*Transcontinental Cases of 1922*, 74 I. C. C. 48, p. 68-71.)

Appellant goes on to say (p. 50) that this finding of the Commission falls far short of the finding that the rates are of such a character as will enable the rail lines to continue as sufficient and effective transportation agencies, that such a finding does not give consideration to the necessary cost and expense which rail lines must pay in order to cover overhead, maintenance, repairs, and interest. Appellant seems to assume that the rail lines can obtain the funds to enable them to make these payments even though they transport no traffic. The rail lines proposed those reductions in the rates in order to enable them to meet these payments, by regaining some share of the sugar traffic which they have lost to these competitive agencies of transportation. The Commission itself gives emphasis to the enormous losses that the rail carriers have sustained in the sugar traffic that they formerly transported (R. 21, 22, 23, 24, 36).

Appellant refers (pp. 43-44) to certain statistics taken from the annual reports of the Interstate Commerce Commission, all for the purpose of proving that the system costs of handling freight on the Illinois Central are not 6 mills per ton mile but considerably higher. Appellant assumes that the question whether the rates approved by the Commission are reasonable and compensatory will be tried out anew on facts that are not before this Court. But it is not necessary here to undertake to point out the many fallacies in appellant's computations. It is merely sufficient to say that appellant was given every opportunity before the Commission and took advantage of that opportunity to present all the evidence it desired on the question whether the proposed rates would be reasonable and compensatory. Appellant has not brought before this Court the record before the Commission and it may not therefore question in this Court the sufficiency of the evidence to sustain the findings of the Commission. Appellant seeks in this Court to argue the weight of the evidence before the Commission but without the evidence upon which the Commission acted. This Court has said many times that it will not consider the expediency or wisdom of the Commission's order, or whether on like testimony it would have made a similar ruling, that the Commission's findings are made by law *prima facie* true, and that this Court ascribes to them the strength due to the judgments of a tribunal appointed by law and informed by experience. (*Interstate Commerce Commission* v. *Union Pac. R. R. Co.*, 222 U. S. 541, *Ill. Cent. R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441.) To consider the weight of the evidence is beyond the province of the Court. (*Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268.) This Court has, furthermore, said that papers in the Commission's files are not always evidence in the case,

that nothing can be treated as evidence which is not introduced as such. (*United States* v. *A. & S. Ry. Co.*, 265 U. S. 274, p. 288.)

All these considerations show that the point that appellant now seeks to make in this Court was essentially one for determination by the Interstate Commerce Commission.

The question whether the proposed rates would be reasonable and compensatory was one to be determined by the Commission, upon evidence and after a hearing. It was so determined and may not under the circumstances here present now be questioned.

Appellant lays great stress (p. 45) upon the sugar rates formerly in effect, pointing out that these rates were established following the suggestions of the Commission in its decision in the *Sugar Cases of 1922*, 81 I. C. C. 448, and that the rate of 54c formerly in effect from New Orleans to Chicago was less than a reasonable or compensatory rate.

Appellant overlooks the fact that there may be a substantial difference between a reasonable maximum rate and a reasonable minimum rate, that the Commission was called upon to determine in this particular case what would be reasonable minimum rates. The circumstances and conditions surrounding the sugar traffic had furthermore undergone a substantial change since the decision of the Commission in the *Sugar Cases of 1922, supra,* (decided July 17, 1922). In the decade since 1922 this country has seen the growth, as the Commission pointed out in its decision (R. 21), of "new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers."

There is no requirement in the law that when such a

sweeping change in conditions occurs the rail carriers are without any power to establish rates that will give their all-rail routes an equality of opportunity with the water and truck routes of their competitors, and that will enable them to retain some fair share at least of the traffic that they must have if they are to continue to provide an adequate system of transportation for the public generally.

Appellant argues that the proposed rates were lower than necessary to meet the charges of the responsible and reliable barge lines, and refers to the rates of these lines from New Orleans to St. Louis, Cincinnati, and Louisville as compared with the proposed rates of the carriers (pp. 52-53). Appellant here refers to only some of the facts set out in the report of the Commission, and seeks to confine the Court's consideration of the issues to the particular facts selected by the appellant. The rail carriers were concerned not only with the competition by water from New Orleans to St. Louis, Cincinnati and Louisville, but with the competition from New York to Chicago, competition considered at length by the Commission in its decision (R. 23-28). The Commission points out (R. 26) that the average rate initially charged from New York to Chicago was evidently less than 27c but perhaps more than 22c, this rate including the cost of loading, unloading on warehouse floors or into cars at destination water-front, and marine insurance. The Commission dealt at length with the terminal expenses connected with the handling of waterborne traffic, the delays enroute, and fixed an all-rail rate from New Orleans to Chicago of 34c, considerably higher than the cost of transporting sugar by the water-competitive route from New York to Chicago.

Appellant goes on to say (p. 53) that the decision of the Commission indicates that the carriers by their pro-

posed rates intended to meet the competitive rates of the contract barge operators, but that the Commission expressly denies this inference when it specifically finds that nine-tenths of the waterborne sugar moving from New Orleans to St. Louis was transported on rates of 37 and 42 cents (R. 44). This is a very inadequate and incomplete portrayal of the whole situation that the Commission had before it.

The cost of moving sugar by contract barge from New Orleans to St. Louis was according to one witness about 23c and according to another witness about 29c (R. 40). The decision shows that, while most of the sugar had been moved in barges of the standard companies (R. 44), the practice of shipping sugar in contract barges developed rapidly in 1932, that at least two of the largest refiners resorted to it as a means of meeting the flood of sugar moving by water from the East and California, that one refiner financed barge operations and was thus in a position to dictate what rates should be charged, that the carriers were apprehensive about the situation and feared that if the tendency was not stopped, all the refiners, to protect themselves, would use contract barges or provide their own barges, that petroleum, steel, and cotton interests had already entered the river transportation business to a greater or less extent (R. 43-44).

Certainly these were all facts that the Commission was justified in considering. It was not required to take a few isolated facts from the record and base its decision on those facts alone. It had the right and the duty to consider and weigh all the facts, and upon those facts to determine whether the rates proposed were unreasonably low.

The length of the decision (R. 19 to 61) gives some clue to the almost infinite number of facts before the

Commission in this case, and to the care with which the Commission considered and weighed those facts. There can be no doubt but that the facts found by the Commission in its report overwhelmingly support the conclusion of the Commission that the rates proposed by the rail carriers from New Orleans to northern destinations would pay more than the cost of the service. They were, therefore, not unreasonably low, and were not in violation of law.

SECTION 500 OF THE TRANSPORTATION ACT DOES NOT MAKE UNLAWFUL ANY RATE WHICH UNDER THE INTERSTATE COMMERCE ACT IS A LAWFUL RATE.

THE COMMISSION'S DECISION MOREOVER SHOWS THAT THE COMMISSION IN PASSING UPON THE ISSUES IN THIS CASE CONSTRUED AND APPLIED THE INTERSTATE COMMERCE ACT IN THE LIGHT OF SECTION 500 AND THE POLICY OF CONGRESS THEREIN DECLARED.

Appellant argues (p. 54) that the express findings contained in the Commission's decision in this case and the inferences therefrom establish the fact that the Commission refused and failed to give effect to Section 500 of the Transportation Act of 1920 (49 U. S. C. Sec. 142), and that the order in this case is therefore unlawful and void.

Section 500 reads as follows:

> "Sec. 500 (U. S. Code, Title 49, Section 142).—It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

Appellant's petition makes repeated references to Section 500 (R. 2, 3, 5, 6, 9) and thus gives emphasis to the reliance that the appellant places upon Section 500.

Section 1 (R. 2) states, among other things, that appellant undertook the operation of a line of barges on the Mississippi and Ohio Rivers by reason of the assurance that water transportation would be preserved in full vigor under the mandate of federal enactment. Section 3 (R. 2, 3) states that the Commission is charged with the administration and enforcement of Section 500. Section 9 (R. 5) quotes Section 500 and charges that the Commission has entirely failed and refused to give effect to this section, and that the decision of the Commission now before this Court "contravenes the mandate that water transportation be fostered and preserved in full vigor."

It is apparent from these and other allegations in the bill (Sec. 13, R. 9, Sec. 18, R. 14), and from appellant's argument that appellant in the last analysis rests its case upon some sort of a guarantee that it has extracted from Section 500 that its operations will be made immune from competition, that it may change its rates to meet the competition of other carriers, including rail lines, but that rail carriers may not under Section 500 so reduce their rates as to enable the railroads to meet fairly and equitably the competition of the appellant.

We think it a fair statement that appellant's case in the last analysis rests upon this alleged violation on the part of the Commission of Section 500.

Section 500 is merely a declaration of policy on the part of Congress. It is not addressed to the Commission any more than to any other governmental body or officer. While it declares a policy of Congress, it prescribes no standards for the Commission or any other governmental body or officer to follow, and the Commission in so far as it may be required to give effect to this policy in construing the Interstate Commerce Act,

the Act which the Commission administers and which contains the charter of its powers, obviously has a wide discretion upon the facts in the cases as they come before the Commission.

Section 500 lays down no standard by which the Commission may determine the lawfulness of freight rates. The standards that must guide the Commission in its determination of what constitutes lawful rates are found in the Interstate Commerce Act. As stated by this Court in *Keogh* v. *C. & N. W. Ry. Co.* 260 U. S. 156, (p. 162):

> "What rates are legal is determined by the Interstate Commerce Act."

The Interstate Commerce Act fixes the standards to be applied by the Commission in the cases as they come before the Commission. Rates must be just, reasonable, nondiscriminatory, nonpreferential and nonprejudicial. They may not, without the authority of the Commission, be in violation of the Fourth Section. But Section 500 of the Transportation Act contains no such standards. It merely declares the policy of Congress.

This Court in *Ann Arbor Railroad Co.* v. *United States,* 281 U. S. 658, had occasion to construe the joint resolution of Congress of January 30, 1925, known as the Hoch-Smith Resolution. Congress undertook to state in this resolution what policy of rate making should be pursued by the Commission. This Court said (p. 668) that the resolution did not purport to make any change in existing laws, but on the contrary required that law to be given effect, that it did not purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.

To paraphrase the language of this Court in the case just cited, Section 500 of the Transportation Act does

not purport to make any change in the existing law, to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law, that is, the Interstate Commerce Act. Section 500 does not give its own definition of a lawful rate, and what is a lawful rate must be determined by the application of the standards found in the Interstate Commerce Act.

There is no basis, therefore, for the contention that the Commission's order in this case is void because it sanctions a violation of a statute which merely declares the policy of Congress.

The Commission's decision shows on its face that what it determined was whether the rates proposed by the carriers on sugar from New Orleans would be in violation of any of the provisions of the Interstate Commerce Act, that is to say, whether they would be unreasonably low or unjustly discriminatory, or unduly preferential or prejudicial, or in violation of Section 4. The Commission pointed out that the carriers did not apply for Fourth Section relief (R. 43), that the rates would not be unduly preferential (R. 47-48), that certain of the proposed rates were lower than the necessities of the situation required (R. 49), that is to say, they would be unreasonably low, the Commission finding, however, that rates 4c higher than such rates had been justified. It is plain that the Commission in passing upon the issues in this case did precisely what the Interstate Commerce Act required it to do: to determine the lawfulness of the proposed rates by the standards laid down in the Act.

And the fact will not be overlooked that the evidence upon which the Commission acted is not before the Court and that the Court therefore cannot question the sufficiency of the evidence to support the findings of the Commission.

But even if it be assumed or conceded that the Commission is under the law required to apply and give effect to the declaration of policy contained in Section 500, an examination of the Commission's decision will show that in passing upon the issues before it the Commission had in mind this declaration of policy, and construed and applied the Interstate Commerce Act in the light of that declaration.

The Commission very recently made this statement respecting Section 500 in a case involving ex-river rates on coal (I. & S. Docket No. 3282, *Ex River Coal from Colona and Conway, Pa., to Youngstown, Ohio*, 197 I. C. C. 617, p. 633):

> "Whether the expression of Congress (Section 500) is to be regarded merely as a policy, or otherwise, the fact remains that that policy if it be merely a policy has not altered since the time of its expression and it is our duty as an agent of Congress to carry out that policy consistent with existing law."

The Commission in the second paragraph of its decision, after referring to the competition for the sugar traffic by rail, water and truck carriers, and the serious inroads that the water and truck carriers have made in the sugar traffic of the rail carriers, said (R. 22):

> "While the loss of traffic by the rail carriers is a matter for our serious consideration, the rights of the water and truck carriers and the value of their services to the public must not be overlooked. This is particularly true with respect to certain barge lines operating on the Mississippi, Ohio, and Illinois Rivers under our findings of public (fol. 36) convenience and necessity. See *Procedure Under Barge Line Act*, 148 I. C. C. 129; *Through Routes and Joint Rates*, 153 I. C. C. 129; *Application of Mississippi Valley Barge Line Co.*, 167 I. C. C. 41; *Application of American Barge Line Co.*, 182 I. C. C. 521; and subsequent reports."

That the Commission carefully considered and weighed

the testimony offered before it by appellant is shown by the repeated and numerous references in the decision to the appellant and its testimony (R. 32, 36, 39, 40, 41, 42, 43, 44, 45, 46). A reference to these pages will disclose the patience and thoroughness with which the Commission reviewed and weighed the testimony offered by the protestants against the proposed rates, the principal protestant being the appellant in this case.

It is, moreover, of the greatest significance that appellant by the proposals that it made before the Commission respecting the all-rail rates from New Orleans to destinations in the North, proposals that are specifically referred to by the Commission in its decision, conceded that the all-rail rates from New Orleans under existing conditions were too high and that they should be substantially reduced. Appellant in its brief before the Commission said it suggested these reductions to afford rail carriers an "equal opportunity to compete with water carriers," and to "bring about a proper competitive balance." Appellant never conceded that a distribution of the sugar traffic out of New Orleans under which the barge lines, including appellant's line, carried for example in 1932 over 500,000 tons of sugar by water, about ten times as much as was carried out of New Orleans by the all-rail routes (R. 36), reflected a fair and equitable distribution of this sugar tonnage as between the railroads and the barge lines.

The all-rail rate formerly in effect from New Orleans to Chicago was 56c. The carriers proposed a rate of 30c based upon a minimum weight of 80,000 pounds per car (R. 38), while appellant suggested a rate of 40c (R. 39). The Commission approved a rate of 34c, 4c more than the rate proposed by the rail carriers, and 6c less than the rate proposed by appellant.

The all-rail rate formerly in effect from New Orleans to St. Louis was 52c. The rail carriers proposed a rate of 28c (R. 38). Appellant suggested a rate of 38c (R. 41). The Commission approved a rate of 32c, 4c more than the rate proposed by the rail carriers and 6c less than the rate suggested by appellant.

The facts just stated show how essentially this was a case for the determination of the Commission. There was no contention on the part of appellant that the rail carriers should be required to maintain the then-existing rates. Both the rail carriers and appellant proposed substantial reductions in the rates, and the real issue was what rates would not be less than reasonable minimum rates. The Commission's decision shows the almost infinite number of facts that the Commission had before it in passing upon this issue.

With this concession of appellant that the all-rail rates from New Orleans were too high, that they should reasonably be reduced, the Commission was required to determine whether the rates proposed by appellant or those proposed by the rail carriers should be fixed as reasonable minimum rates. The Commission, after considering the testimony and making an exhaustive review of the pertinent facts, concluded that the rates proposed by the rail carriers based upon a minimum weight of 60,000 pounds, had been justified, but that the rates proposed by the rail carriers, based upon a minimum weight of 80,000 pounds, were somewhat lower than the necessities of the situation required (R. 49), and found that the rail lines had justified rates 4c higher.

The Commission's decision indicates the extreme care with which it undertook to determine what would be a fair relationship between the rates of the rail carriers and those of these barge lines. It will be recalled that the port-to-port rates of the barge lines that have been

given certificates of public convenience and necessity by the Commission are theoretically based upon 80 per cent of the all-rail rates between the ports, that is to say, the barge differential is 20 per cent of the all-rail rate, and that the barge-rail rates from New Orleans, for example, to an interior point in the North not located on a navigable stream, are arrived at by deducting from the all-rail rate this 20 per cent differential (R. 38, 39). Obviously, any reduction in the all-rail rates reduces this differential, and narrows the spread between the all-rail rates and the rates in connection with the water service of these barge lines. Thus when appellant conceded that the all-rail rate of the rail carriers was too high and should reasonably be reduced, this concession carried along with it a concession that the differential between the all-rail rate and the rates in connection with the water service was too great and should be narrowed.

The Commission itself found (R. 45) that the indications were that the differential is much too wide from a competitive-service standpoint, for the standard barge lines were taking most of the business.

In addition to the operations of the so-called "standard" barge lines, barge lines that had been granted certificates of public convenience and necessity by the Commission (R. 36), tramp or contract barges operated on the inland waterways. These tramp and contract barges did not join in through routes and joint rates with the rail carriers, but confined themselves solely to the transportation of port-to-port traffic. Neither their operations nor rates were to any extent whatever subject to the control of the Commission. Appellant treats this case as if the Commission had before it the operations of these "standard" barge lines only. The Commission's decision gives emphasis to the growing importance of the contract barges and to the apprehensions which the in-

creasing use of the contract barges had caused on the part of the rail carriers (R. 43-45).

Certainly the Commission, in considering the issues in this case, was bound to consider and weigh not only the evidence dealing with the rates and the operations of these "standard" barge lines but with the operations of rates of these so-called "contract" barge lines. And its decision shows that it did so.

The Commission's decision indicates the thoroughness with which it undertook to determine what the port-to-port rates were of these barge lines, including not only the "standard" barge lines but the contract lines. It recognized, of course, that the port-to-port rates are not subject to regulation, that they are not required to be published, and that they may be changed from day to day.

Necessarily, under such conditions, a regulating body has difficulty in determining the actual rates that are being charged by the barge lines for the transportation of sugar not only from New Orleans to St. Louis, Cincinnati, Louisville, and Chicago (R. 39, 40, 41, 42), but from New York to Chicago (R. 26), and this difficulty the Commission experienced in this case.

And the Commission gave consideration to the fact that where the rates of these barge lines apply from port-to-port only, there are in many cases additional charges that must be added to obtain a rate comparable to an all-rail rate, such as the cost of getting the sugar to the barges, marine insurance, the unloading cost at destination, the cost of transferring the sugar at destination from the barge to the warehouse, and the damage on account of transportation by water (R. 26, 40).

Clearly, what the Commission did was to determine as accurately as it could upon conflicting evidence, what the total costs were of transporting sugar by barge from

New York to Chicago and from New Orleans to ports on the upper Mississippi and Ohio Rivers, and to determine what would be a fairly related rate by rail, and a rate, moreover, that would reflect the superior and more expeditious service inherent in rail transportation.

Let us consider briefly the situation with respect to the rates to Chicago for the purpose of showing just what facts the Commission had before it as disclosed by its decision. The Commission found (R. 26) that the average rate initially charged from New York to Chicago by water was evidently less than 27c and perhaps more than 22c. This rate included the cost of loading, unloading on warehouse floors or into cars at destination waterfront, and marine insurance. The Commission recognized as heretofore pointed out (R. 25) that it would be impossible to determine exactly just what the water rates were for the movement of sugar from New York to Chicago. The Commission pointed out that rates much lower than 22c and 27c had been quoted but had not been used (R. 26).

In order to meet at Chicago, the second largest city and the largest sugar market in the country (R. 21), the competition of the water carriers operating from New York, the Southern carriers proposed a rate of 30c from New Orleans.

Now the question before the Commission was whether this rate of 30c would enable the rail carriers fairly and reasonably to meet the competition of the water lines at Chicago, taking into consideration first, the cost of moving the sugar by water from New York to Chicago, and second, the superior service of rail transportation.

That the Commission gave consideration, and exhaustive consideration, not only to the question of what the

water costs were but the question of what should be added to those water costs to reflect the added value of the rail service, is shown by the following from the Commission's decision (R. 27-28):

> "After inquiring into the question of what the water and truck rates are and what should be added roughly to represent unknown amounts for storage, switching transfer, and other services, we are faced with the question of how much more the rail service is worth in actual practice. Rail shipments generally reach destination in from four to six days, but water shipments are on the way two or three weeks. Rail service is also superior in that it is safer, involves less handling of and damage to packages, is more regular, and otherwise more dependable. Shipments by rail can be reconsigned or stopped in transit for partial unloading at nominal charges. However, unlike water service, rail service does not include loading and unloading, which cost the shipper perhaps 3 or 4 cents per 100 pounds. Water service can be used for a large part of the traffic without great inconvenience or disadvantage, rapid transit being generally unnecessary, but in certain respects, particularly at times, water service is not suitable for special shipments. Sugar lends itself to storage in large quantities, and distribution from warehouses by truck in small amounts is popular with the trade. Water service is never more desirable than rail service, except for reasons of economy or where slow movement is desired as a substitute for storage or in the case of a rising market. * * *"

The Commission pointed out (R. 28) that in these days when businessmen have to watch every penny, there is a strong inclination to use the cheapest mode of transportation even though not altogether satisfactory, that it would be helpful if the Commission knew what the water rates were, that if some water shipments paid 22c and others as much as 27c from New York to Chicago, the question arises as to what the rail rate should be (R. 28).

And the Commission, after considering whether the

rates proposed by the eastern carriers from the eastern port to Chicago were less than reasonable minimum rates, and finding that they were not and that the proposed rate from Baltimore to Chicago, for example, of 39c was not unlawful (R. 29, 35) found, as stated, that the proposed rate of 30c from New Orleans to Chicago was lower than the necessities of the situation required but that the carriers had justified a rate 4c higher or 34c.

Thus the decision of the Commission shows on its face that it considered whether the proposed rates would be lawful rates under the standards laid down in the Interstate Commerce Act, but in the light of the declaration of policy contained in Section 500 of the Transportation Act. It considered what would be an all-rail rate that would be fairly related to the cost of transporting sugar by water and that would at the same time, to use the language of the Commission (R. 27), reflect how much more the rail service is worth in actual practice than the water service.

The Commission made the same analysis with respect to the rates to St. Louis. It found that the standard barge line rate from New Orleans to St. Louis was 42c, except that appellant maintained a lower rate of 37c (R. 39), that the rates of the contract barges from New Orleans to St. Louis were about 20c (R. 40), but that certain charges must be added to this rate of 20c to cover loading, unloading and marine insurance, that there was a dispute in the testimony as to how much should be added, one witness testifying that the amount should be between 3 and 4 cents and a witness for appellant testifying that it should be more nearly 9 cents (R. 40). Thus the total cost of shipping by contract barge from New Orleans to St. Louis was at least 23c according to one witness and 29c according to appellant's witness. The rail carriers proposed a rate of 28c

from New Orleans to St. Louis. The Commission considered in detail the St. Louis situation, what the barge line differentials would be under the proposed rates, and concluded that the rate of 28c proposed by the rail lines was too low by 4c. Thus the rate became 32c and the barge line differential was reduced from 10c to 6.5c, the standard barge rate from New Orleans to St. Louis, by application of the 20 per cent differential to the rate of 32c, becoming 25.5c (R. 50).

The Commission referred to the fact (R. 40) that the traffic manager of one of the principal refiners suggested 6c as a proper differential for the standard barge lines under the rates of the all-rail lines, and that appellant proposed a rate of 38c from New Orleans to St. Louis, which on the 20 per cent basis would reduce the barge line differential from 10c to 7½c. If the rate of 28c proposed by the rail carriers from New Orleans to St. Louis had been approved by the Commission, the differential would have been reduced from 10c to 5½c.

We call attention to these further facts as giving some indication of the difficulties and perplexities of the problem that the Commission had before it, of the varied and numerous facts that were presented to the Commission, of the fairness and the openness of mind with which the Commission approached the question as to what would be a fair and equitable relationship between the all-rail rates of the rail carriers and the rates of these barge lines, and how such a relationship could be brought about.

It must be borne in mind that if the port-to-port rates of these barge lines were subjected to the same regulation as the rail rates of the railroads, the question could have been approached in an entirely different way and could have been dealt with in a different manner. If

the Commission had had the power to fix the minimum rates of these barge lines, it could have fixed minimum port-to-port rates in the first instance and then determined what would be a just and reasonable differential to be added thereto to obtain the rates for the rail carriers.

But under the law as it now reads the Commission has no power whatever over the port-to-port rates of these barge lines and has no power to fix minimum rates for the transportation of property for a joint barge and rail service (Section 15 (1), 49 U. S. C. Sec. 15 (1)). Just and reasonable differentials between the all-rail rates and the rates in connection with the water service can, therefore, in the present state of the law be brought about only through reductions in the all-rail rates, and questions of how far these reductions may go, and what will be reasonable minimum rates, are under the law confided to the Interstate Commerce Commission.

Appellant argues that it does not contend that Section 500 grants it an immunity from competition (p. 49). But this in the last analysis is the substance of its contention. Appellant proceeds on the theory that under Section 500 it has the right to divert to its water routes traffic that formerly moved by the all-rail routes, and that Section 500 makes it impossible for the rail carriers to establish and maintain a basis of rates that will give their all-rail routes an equality of opportunity with the water routes of appellant and will enable the rail carriers to obtain, to use the phrase that the Commission has (*American Hawaiian S. S. Co. v. Erie Railroad Co.*, 152 I. C. C. 703, pp. 710-711) a "reasonable share of the traffic herein involved." Appellant has never contended that a division of the sugar tonnage out of New Orleans, under which it and other barge lines obtained 90 per

cent of the traffic and the rail carriers 10 per cent, gave the rail carriers a "reasonable share" of the sugar traffic.

Appellant says (p. 62) that it does not contend that it should be given a preference in rates over a common carrier by rail, that it is here contending for the right to continue in existence as a transportation agency and contending that under the law the Commission has no power by its decisions to select rail lines as the sole transportation facilities in which to carry the commerce of the United States. The Commission has not by its decision in this case selected the rail lines as the sole facilities for the transportation of sugar. The Commission has recognized what appellant recognized, that there was an unfair relationship between the all-rail rates from New Orleans and the rates in connection with the water service, and has sought to correct that situation. The Commission has endeavored to establish a reasonable and fair relation between the rail rates and the rates in connection with this service by water, handicapped as the Commission is, in its efforts to arrive at this most desirable result, by the fact that it has no jurisdiction over the port-to-port rates of appellant and these other barge companies.

The Commission in a very recent decision involving the rates of the American Barge Line Company (*Application of the American Barge Line Co.*, 190 I. C. C. 177) said, p. 180:

> "The question of the amount of the differentials to be prescribed is difficult, and the petitions and replies throw little light upon it. Under the law the differentials must be such that the joint rail-water transportation to which they relate shall be upon terms reasonably fair to both rail and water carriers, not designed to divert traffic from one or the other but to reflect differences in cost and value of service. * * *"

Appellant overlooks the fact that Section 500 of the Transportation Act declares it to be the policy of Congress to foster and preserve in full vigor both rail and water transportation. Appellant treats this section as referring to water transportation only. The Commission in *Reduced Rates to the Pacific Coast*, 89 I. C. C. 512, after referring to Section 500, said (p. 538), that the policy of Congress in this respect could be effectuated only under rate adjustments which will permit of an equitable distribution of available traffic.

The Commission pointed out in the very first paragraph of its report that the rail carriers are in poor financial condition and need increased revenues (R. 32).

Clearly what the Commission sought to accomplish in this case was an adjustment of rates that would permit of a more equitable distribution of the sugar traffic from New Orleans between the rail carriers on the one hand and the barge lines on the other than had theretofore existed.

As the Commission has said, it does not fix the rates for the rail carriers and the rates for the barge lines and the differentials between those rates for the purpose of diverting traffic from one or the other. It fixes rates that are designed to reflect the differences in the cost and the value of the service (*Application of American Barge Line Co.*, 190 I. C. C. 177). The Commission does not hold that one carrier rather than another is entitled to the traffic on a particular commodity. It seeks, so far as it can under the conditions existing at the present time, and bearing in mind the fact that it has no control over the port-to-port rates of the barge companies, to establish rates that will enable the rail carriers and the water lines to compete on a fair and equitable basis with one another. It has the power to restrain competition on

the part of the rail carriers when that competition leads to proposals on the part of the rail carriers to establish rates that are in violation of some provision of the Act. It can through the minimum rate power, as it did in the instant case, fix a rate below which the rail carriers may not go. The Commission said in *Luckenbach Steamship Co.* v. *Southern Railway Co.*, 157 I. C. C. 752 (p. 760) that the Commission

> "will not permit much less require, carriers subject to our jurisdiction to engage in unreasonable competition. This we take it was the purpose of Congress in conferring upon this Commission the minimum rate power."

It is the power of the Commission to fix minimum rates that affords a real protection in favor of these barge lines and against the proposals of the railroads, and enables the Commission to carry out the policy of Congress as expressed in Section 500.

We may well direct attention to what the Federal Coordinator of Transportation said in his report of March 10, 1934 (p. 73):

> "However, there is little warrant for a belief that the Commission has been unduly favorable to the railroads, as compared with water carriers. Certainly the railroads entertain no such thought. Their comments upon the administration of the Fourth Section and of the Inland Waterways Corporation Act are sufficient evidence of this fact."

There is no provision in the Interstate Commerce Act, as appellant seems to think there is, that requires rail carriers to maintain their rates on such a high level as to prevent traffic from moving by rail. Rail carriers have the right to compete for traffic just as the appellant has. They have the right to reduce their rates, provided only that the reduced rates are not in violation of the Interstate Commerce Act.

These barge lines, including appellant, operate on waterways that are maintained at the expense of the taxpayers. The taxes they pay are trivial in amount compared with the taxes the railroads pay. The wages and hours of their employes are not subject to regulation and control as are the wages and hours of the railroad employes. The experience of the past decade has made it very plain to the railroads that they do not enjoy any monopoly in traffic. But they do contend with all the earnestness in their power, that if they are to continue to provide an adequate system of transportation for the public as a whole, they are entitled to maintain rates that are not unreasonably low, that are not unduly preferential or unjustly discriminatory, that are not in violation of the Fourth Section except when authorized by the Commission, but that at the same time will give their all-rail routes an equality of opportunity with the water carriers, and will give the rail carriers a fair and reasonable opportunity to compete with the water carriers.

Appellant seems to treat the certificate of public convenience and necessity granted to it by the Commission (*Ex Parte No. 99, Application of Mississippi Valley Barge Line Co.*, 167 I. C. C. 41), as a sort of letter of marque under which it could prey upon the traffic of the railroads, but which would prevent the railroads from establishing rates that would enable them to meet on a fair and reasonable basis the competition of appellant. Of course appellant knew as a matter of law at the time it started operations that it would have to meet the competition of other agencies and means of transportation. It knew that railroad rates are not static, that they may be increased or reduced, provided always that they do not violate the Interstate Commerce Act. Neither the certificate of public convenience and neces-

sity issued by the Commission to appellant nor Section 500 of the Transportation Act makes the operations of appellant immune from competition.

These interveners respectfully submit that the orders of the Commission in this case do not sanction a violation of the Transportation Act but that on the other hand the Commission's decision makes it clear that the Commission in considering the issues before it construed and applied the Interstate Commerce Act in the light of Section 500 of the Transportation Act.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF THE ANTI-TRUST LAWS.

Appellant states (p. 66) that the reductions in rates complained of by it were initiated through concerted action of the various executives of the southern lines who authorized their publishing agent to prepare and file sweeping reductions in the going sugar rates, and argues that clearly this concerted action comes within the prohibition of the anti-trust laws (15 U. S. C., Secs. 1 and 2), if it results in restraint of trade or monopoly.

Appellant argues (p. 78) that the statement of the Commission which shows that the Commission clearly admits that the rates found justified will restrain trade and commerce among the several States, is found in the following (R. 42-43):

> "The proposed rates, as applied to the interior points alone, would probably bring respondents heavy traffic, would stop a large part of the distribution of water-borne sugar and dry up much of the water movement."

And the further statement (R. 46):

> "Protestant urges that the respondents have conspired in restraint of trade and in violation of the

anti-trust law to monopolize the traffic. If respondents succeed the barge lines will be dealt a staggering blow."

The court's attention is first directed to the fact that the Commission found that the proposed rates based upon a minimum weight of 80,000 pounds, the rates that really concerned appellant, had not been justified by the carriers, that they were lower than the necessities of the situation required, but found that the carriers had justified rates 4c higher, an increase of about 13 or 14 per cent. The respondent carriers did not succeed in convincing the Commission that the rates they proposed would be reasonable minimum rates. The Commission made no finding that the respondent carriers either under the proposed rates or those which the Commission found the carriers had justified would be able to monopolize the sugar traffic from New Orleans. The Commission's decision shows (R. 36) that the barge lines have enjoyed a practical monopoly of the movement of sugar from New Orleans, the movement by barge in 1932 from New Orleans amounting to over 500,000 tons, about ten times as much as moved by rail. What the Commission sought to do was to establish rates that would give the all-rail routes an equality of opportunity with the barge routes with respect to this traffic.

The Commission thus made no finding that the carriers in proposing the reduced rates had violated or would violate the anti-trust laws. The Commission indeed was not called upon and had no occasion to consider the question whether the carriers had violated the anti-trust laws. This was not the issue before the Commission. The Commission is not empowered to enforce the anti-trust laws. It passes upon the lawfulness of rates and determines their lawfulness by the standards laid down in the Inter-

state Commerce Act. As stated by this court in *Keogh* v. *C. & N. W. Ry. Co.* 260 U. S. 156 (p. 162):

> "A rate is not necessarily illegal because it is a result of a conspiracy to restrain trade in violation of the Anti-Trust Act. But rates are legally determined by the Act to Regulate Commerce."

We are utterly unable to understand what basis or justification there can be for this argument of appellant. This proceeding is not one to restrain an alleged violation of the anti-trust laws, or to recover damages for such violation, but is a proceeding against the United States under the District Court Jurisdiction Act (28 U. S. C., Secs. 43, 48), to set aside an order of the Commission. We do not see how this proceeding can be converted into a proceeding in which this court can find, without a scintilla of evidence before it, that the carriers that published the reduced rates on sugar from New Orleans to the North had violated the anti-trust laws or that the Commission itself has sanctioned such a violation.

The contention that the Commission should enforce the anti-trust laws is not a new one, although it has many times been urged upon the Commission itself. The Commission has always held that it is without authority to administer the anti-trust act, or even to determine whether it has been violated; that if its investigation showed that the anti-trust act had been violated, the Commission's power would not be enlarged or its duty changed with respect to the rates involved; and that the utmost it could do would be to lay the proofs before the Attorney General. (*Sprigg* v. *B. & O. R. R. Co.* 8 I. C. C. 443; *China Trading Co.* v. *Georgia R. R. Co.* 12 I. C. C. 236; *Warren Co.* v. *Southern Railway Co.* 12 I. C. C. 381.)

This court has recently had occasion to point out (*Central Transport Co.* v. *Terminal Railroad Company of St. Louis*, 288 U. S. 469, p. 473) that under the Sherman Anti-

Trust Act the government alone was authorized to maintain a suit to restrain violations of its provision (*Kane Lumber Co.* v. *Neal*, 244 U. S. 459), that private persons were first authorized to bring suit for that purpose by Paragraph 16 of the Clayton Act (U. S. C. Title 15, Sec. 26), but with this proviso: "that nothing herein contained shall be construed to entitle any person, firm or corporation or association except the United States to bring suit in equity for injunctive relief against any common carrier subject to the provisions" of the Interstate Commerce Act "in respect of any matters subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." This court held that the Central Transport Company had no right under the statute to bring suit against certain rail carriers having terminals in St. Louis, Missouri and East St. Louis, Illinois, to restrain an alleged violation of the Sherman Anti-Trust Act, on the ground that the acts complained of involved matters subject to the jurisdiction of the Commission.

Appellant argues (p. 73), that it does not seek a ruling that the carriers themselves who reduced the rates on sugar from New Orleans had violated the anti-trust laws, but a ruling that the Commission, a federal agency, had rendered a decision which is "admittedly contrary to the Sherman Act." But the anti-trust laws are not directed against agencies or instrumentalities of the Government of the United States, but against a contract, combination, or conspiracy, in restraint of trade, and against persons who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States (15 U. S. C., Secs. 1 and 2). The substance, therefore, of what appellant seeks to obtain is the same

as that which the Central Transport Company sought to obtain in the case just cited. And as stated by the District Court in its opinion (4 Fed. Supp. 745, p. 747, R. 97), the answer to this contention is obvious: only the United States can sue to enjoin, for an alleged violation of the anti-trust laws, a combination of common carriers subject to the provisions of the Interstate Commerce Act with respect to a matter within the jurisdiction of the Interstate Commerce Commission.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF SECTION 3.

Appellant argues (pp. 74-75) that the Commission's decision violates Section 3 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 3 (1)), which section prohibits undue preference or prejudice. Appellant refers (p. 74) to certain findings of the Commission which we shall later quote.

That the Commission, in passing upon the issues before it, considered whether the rates proposed by the rail carriers would violate Section 3 is shown by the discussion of the evidence respecting this issue in the decision itself (R. 47, 48, 49). The Commission said that if the proposed rates from New Orleans were approved, the rate from New Orleans to Terre Haute, Indiana, for instance, would be reduced from 56c to 30c, while to Paris, Illinois, a nearby point on an eastern line, a rate of 56c would remain. The Commission said (R. 47):

> "Appellant urges that no such disparities would be unduly prejudicial. No one who might be adversely affected appeared. Respondents would publish properly related rates to destinations on the lines of the Eastern carriers if they could get concurrences."

As pointed out by the Commission, Paris, Illinois, is a point on an eastern railroad which refused to join in the

rates from New Orleans, the eastern railroads having filed protests against the rates proposed by the southern carriers from New Orleans based on a minimum of 80,000 pounds per car (R. 47). The rail carriers from New Orleans cannot under the law be charged with undue preference and prejudice in connection with rates beyond their control. (*Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, p. 649.)

The Commission also referred to the fact (R. 48) that rates to western points beyond destinations considered had not been specifically considered by the southern carriers, that certain disparities would therefore result from the establishment of the proposed rates, that the rate from New Orleans to Davenport, Iowa, would be reduced from 62c to 30c, but that from New Orleans to Des Moines, Iowa, for a similar haul, would remain at 65c. The Commission said respecting this disparity (R. 48):

> "The Mississippi Valley Barge Line makes a point of this fact, but no one who might be adversely affected is before us. In the time available it was impracticable for respondents to cover all the territory which might be affected by the competitive conditions. Respondents expect to deal with these situations on their merits after our decision herein."

Appellant in contending that this particular disparity would violate Section 3 overlooks the fact that Davenport is on the Mississippi River, that the rates to Davenport are affected by water competition, while Des Moines is an inland point not located on a navigable stream. It is well established that there can be no finding of undue preference and prejudice unless the circumstances and conditions are substantially the same. (*Interstate Commerce Commission* v. *B. & O. R. R. Co.* 43 Fed. 47, affirmed 145 U. S. 263; *T. & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197.)

Appellant asks this court to weigh the facts found by

the Commission in its decision, and to determine the question of fact whether the rates found not unlawful by the Commission are in fact unlawful in violation of Section 3, although the evidence upon which the Commission acted is not before this court.

Appellant has overlooked the repeated holdings of this court that every rate which gives a preference or advantage to certain persons, commodities, localities or traffic is discriminatory, but that such discrimination is not necessarily unlawful, that the Interstate Commerce Act, by Sections 2 and 3, prohibits only that discrimination which is unreasonable, undue or unjust, that whether preference or discrimination is undue, unreasonable or unjust, is one of those questions of fact that has been confided by Congress to the judgment of the Interstate Commerce Commission. (*N. C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318, p. 322; *T. & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, pp. 219-220; *Manufacturers' R. R. Co.* v. *United States*, 246 U. S. 457, p. 491; *Interstate Commerce Commission* v. *Alabama Mid. Ry. Co.* 168 U. S. 144, p. 170; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, p. 361; *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 145 U. S. 263, pp. 276-277.)

Appellant asks this court to hold that as a matter of law a mere difference in rates results in a violation of Section 3. This is a contention that has been repeatedly pressed upon the Interstate Commerce Commission, which has uniformly held that violations of Section 3 are not established by a showing of a mere difference in rates. (*Indianapolis Freight Bureau* v. *C. C. C. & St. L. Ry. Co.* 23 I. C. C. 195, p. 207; *Loose-Wiles Biscuit Co.* v. *St. L. S. F. Ry. Co.* 136 I. C. C. 353, p. 355; *Astoria* v. *S. P. & S. Ry. Co.* 38 I. C. C. 16, p. 24; *Sunderland*

Brothers v. *C. B. & Q. R. R. Co.* 148 I. C. C. 484, p. 486; *Aluminum Co.* v. *A. T. & S. F. Ry. Co.* 146 I. C. C. 363, p. 372.) The Commission has also repeatedly held that a finding of unlawful discrimination cannot be predicated upon a mere assumption or assertion of its existence, that it may not be predicated upon general representations. (*Rathkamp Brothers* v. *N. & W. Ry. Co.* 179 I. C. C. 25, p. 28; *Kirby-Bonner Lumber Co.* v. *Director General,* 78 I. C. C. 333, p. 336; *Mississippi Railroad Commission* v. *A. & V. Ry. Co.* 89 I. C. C. 47, p. 72.)

Appellant contends (p. 76) that a court of equity cannot condone an apparent and admitted violation of the very act under which the Commission functions and that therefore the Commission's decision which admits of the situation necessarily violates existing law. Appellant overlooks that it is the Commission itself that is charged with the duty of determining whether there are violations of the Interstate Commerce Act, and that the Commission's findings when supported by the evidence are conclusive.

Appellant does not contend that the rates that have been published by these interveners from New Orleans are unjustly discriminatory against it or unduly prejudicial to it. Appellant is in no such position to make any such claim, for it does not forward or receive shipments of sugar, and pays no freight charges on such shipments. Its contention is hardly more than a mere suggestion that shippers, refiners and purchasers, who are not before this court, and who did not complain before the Commission, may file a complaint alleging a violation of Section 3. We may well say what this court said in *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.* 218 U. S. 88, that it will not listen to a party who complains of a grievance which is not his.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF SECTION 4 OF THE INTERSTATE COMMERCE ACT.

Appellant argues (p. 76) that the Commission's decision sanctions a direct violation of Section 4 (1) of the Interstate Commerce Act, familiarly known as the long-and-short-haul clause (49 U. S. C. Sec. 4 (1)).

The Commission's decision shows that it does not sanction a violation of Section 4, that in fact it made no finding that under the adjustment of sugar rates proposed by the carriers there would be a violation of Section 4. The carriers proposing the reduced rates from New Orleans did not seek relief from Section 4, and the Commission itself pointed out in its decision (R. 43) that the carriers explained that the proposed rates from the South to the water-competitive points were blanketed to the interior, not only because of the uncertainties and difficulties attending applications for Fourth Section relief, but because they considered it desirable from a commercial and economic point of view to keep interior dealers on a parity.

An affidavit submitted by appellant at the hearing before the District Court states that the rate fixed from New Orleans to Jonesboro, Arkansas, 486 miles, is 34c, that Jonesboro is intermediate between New Orleans and St. Louis via a direct route, and that the rate fixed by the Commission from New Orleans to St. Louis is 32c, that no Fourth Section relief was granted to the southern lines. (R. 134.)

Not all departures from the long-and-short-haul rule of Section 4 are unlawful. Under that section the Commission has the power to authorize carriers to charge less for a longer than for a shorter distance, and to prescribe the extent to which common carriers may be re-

lieved from the operation of Section 4. (*Intermountain Rate Cases*, 234 U. S. 476, p. 485.) Interveners presented to the District Court an affidavit (R. 160) which states that the departure from Section 4 referred to by appellant is protected by Fourth Section Order No. 7542 of the Commission (R. 161). Appellant argues (p. 76) that this order does not protect this departure.

It is unnecessary, however, for this court to pass upon this dispute between appellant and the interveners as to the construction to be placed upon this order. If it is a fact that there are departures from Section 4 in the adjustment of sugar rates from New Orleans which have not been authorized by the Commission, it is the duty of the rail carriers to remove those departures. If appellant believes that there are Fourth Section departures in the adjustment that have not been authorized by the Commission, it would be entirely proper for appellant to direct the Commission's attention to those departures, that the Commission may consider whether they have been authorized by the Commission, and if not, that the Commission may call upon the carriers to remove the departures. This is not a question however that affects the appellant in any way, or a question which gives it any right to complain in such a proceeding as the present one.

THE DENIAL BY THE COMMISSION OF APPELLANT'S MOTION FOR A REHEARING WAS NOT A DENIAL OF A RIGHT GUARANTEED BY LAW.

Appellant argues (p. 77) that the denial by the Commission of appellant's motion for a rehearing (R. 143) was a denial of a right guaranteed by law. Appellant states that the motion alleged changed conditions "that had resulted during the period from the hearing of said record up to the release of the Commission's decision on July 17, 1933." This concession brings this contention

within the principle recently announced by this court in *United States* v. *Northern Pac. R. Co.* 288 U. S. 490 (pp. 493, 494), to which we shall later refer.

Appellant cites in support of its contention the case of *A. T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, familiarly known as the Western Grain Rate Case. The court in this case set aside an order of the Commission reducing grain rates in the Western District, on the ground that refusal of the Commission to reopen proceedings, in which the Commission had fixed the rates, was an abuse of discretion.

It will be recalled that the record in the Western Grain Rate Case before the Commission was closed in September, 1928; that the matter was submitted to the Commission on argument on July 1, 1929, and that the Commission made its report and entered its order on July 1, 1930, fixing the rates to be charged on and after October 1, 1930. In September, 1930, the carriers requested a rehearing. Prior to action thereon the railroads had brought to the Commission's attention their changed financial condition due to the economic depression. In November, 1930, a rehearing was denied. On February 19, 1931 a second petition for rehearing was presented which averred that due to the nation-wide depression which began in November, 1929, the facts exhibited by the record that was closed in September, 1928, were utterly unrepresentative of conditions existing at the effective date of the order some two and one-half years later.

Here the situation is entirely different. The southern carriers proposed that the reduced rates from New Orleans take effect on October 1, 1932 (R. 1). The appellant and other parties filed a protest against these rates on September 8, 1932, (R. 2) following which the Commission, acting under the authority vested in it by

Section 15 (7) of the Interstate Commerce Act, (49 U. S. C., Sec. 15 (7), suspended the rates and entered upon an investigation concerning their lawfulness. A hearing was held on October 25-November 3, 1932, and the proceeding submitted to the Commission on March 2, 1933 (R. 19). The Commission's report and order were handed down on July 3, 1933 (R. 19). Obviously no such situation is here presented as was presented in the Western Grain Rate Case.

And if the situation had changed it was incumbent upon appellant under the recent decision in *United States v. Northern Pac. Co.*, 288 U. S. 490, to bring at once the alleged changes in conditions to the Commission's attention without waiting for the Commission's decision. But appellant took the chance of a favorable decision and waited until the Commission had handed down its decision in this case before filing on or about July 25, 1933 (R. 142) its motion for a rehearing. Appellant has never contended that the alleged changes in conditions arose only after the date of the Commission's decision (July 3, 1933, R. 19).

In the *Northern Pacific Case, supra*, the District Court had set aside the order of the Commission on the ground that the Commission had abused its discretion in refusing to reopen the case and to receive proof of changes in economic conditions arising after the close of the evidence. But this court upheld the validity of the Commission's order and said (p. 494):

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complaint of the refusal of their petition. They set silent and took the chance of a favorable decision on the record as made. They should not be permitted

> to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

Wholly aside from the point we have just considered, appellant's motion for a rehearing shows on its face that the Commission was amply justified in denying it. The changed conditions which appellant contended had taken place are thus summarized by appellant in its brief (p. 77): (1) depression, (2) National Industrial Recovery Act, (3) competition, (4) regulation, and (5) clarification of the record.

The motion for a rehearing shows (R. 144-145) that while there had been during the summer of 1933 some improvement in business conditions, the improvement had not been great enough to justify the conclusion that the railroads could remain indifferent to the ever-increasing losses in their traffic to their competitors. The total car loadings for the week prior to July 15, 1933 were 106,000 per day as compared with 82,000 for the previous year. But the daily average of car loadings for the five-year period 1928 to 1932 was 144,000 (R. 145). Neither these figures nor the others set out in the motion (R. 145) would have justified the Commission in reopening a case that it had decided as late as July 3, 1933, and which was heard by the Commision as late as the preceding fall.

The National Industrial Recovery Act (Act of June 16, 1933), was passed after the hearing in this case was closed. Appellant contended in its motion (R. 145) that this enactment was intended to and will apply to the essential matters involved in this case, that it provides a means of controlling unfair competition, and would correct the lack of stabilization in the rates on sugar by

the water lines which appellant itself conceded in its motion (R. 146). But this court can take judicial notice of the fact that up to the present time only one code of fair competition for water carriers has been approved, a code dealing with water carriers operating via the Erie Canal (Code of Fair Competition, approved February 6, 1934). No one can say at this time to what extent the approval of codes for water lines will stabilize rates and will eliminate the unfair competition that is now characteristic of the port-to-port rates of these various water lines whose port-to-port rates are subject to no control or regulation whatever. The recent report of the Federal Coordinator of Transportation (report of March 10, 1934), gives emphasis to the utterly chaotic conditions that now exist with respect to the port-to-port rates of the water carriers operating on the inland waterways and along the coasts of the United States, and makes it clear that stabilization in rates can be secured only through regulation in some such manner as the railroads are now regulated.

Appellant contended in its motion for a rehearing (R. 147) that the conditions disclosed by the record in this case have been changed by the withdrawal of the so-called "contract" barge lines from operation between New Orleans and St. Louis. But as shown by the Commission's decision, the contract barge operations were only one of the many considerations dealt with by the Commission in its decision. Appellant did not contend in its motion that there had been any change with respect to the contract barges operating by water routes from New York to Chicago, a matter dealt with at length by the Commission in its report (R. 23, 26). And the Commission itself refers (R. 44) to the fears of the rail carriers that if the tendency on the part of the sugar

refiners at New Orleans to ship by contract barges was not stopped, all the refiners, to protect themselves, would use contract barges or provide their own barges for most of the traffic, that petroleum, steel, and cotton interests have already entered the river transportation business to a greater or less extent.

The Commission found (R. 44) and we emphasize this finding:

> "* * * One of the main purposes of the proposal is, therefore, to discourage the refiners in providing their own means of transportation or patronizing (fol. 51) operators of contract barges. The mere publication of the proposed rates has already deterred one refiner from increasing its river terminal facilities."

These are only some of the many facts that the Commission had before it in this case. The Commission was not obliged to base its decision upon one fact alone in the record before it, but was on the other hand obliged to consider and weigh all the facts. And in passing upon appellant's motion for a rehearing it was its duty to consider all the facts that the Commission had before it, and all the considerations to which it gave weight, and then to determine whether appellant's motion should be granted or denied. The affidavit, moreover, offered in the District Court on behalf of these intervening rail lines conclusively shows that contract barge operation on the Mississippi River had not disappeared (R. 156, 160).

Appellant contended in its motion (R. 148) that the water lines have been active in advocating regulation of water transportation by the Commission or some regulatory body, and confidently expected the passage of such an enactment at the next session of Congress, that it therefore seemed unwise and inopportune on the part

of the Commission to embroil these competitive carriers in warfare if regulation can and is to be secured in the immediate future.

This Court can take judicial notice of the fact that Congress has up to the present time passed no law dealing with the regulation of these barge lines on the inland waterways.

And lastly appellant contends that its motion for a rehearing should have been granted in order that the Commission might clarify the record (R. 148). This is simply an appeal that the Commission reconsider what it had theretofore reconsidered. It will be borne in mind that the decision in this case was by the entire Commission (R. 21).

The District Court was right in its conclusion that appellant's contention was sufficiently answered by the decision of this Court in the *Northern Pacific Case*, 288 U. S. 490 (p. 494):

> "The decision in the *Santa Fe Case* (284 U. S. 248) is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier's revenue. The rule announced while intended to safeguard substantial rights of the railroads may not be invoked where its application would disenable the Commission to protect the interests of the public."

CONCLUSION.

These interveners respectfully submit that the findings and order of the Commission in this case do not subject or threaten appellant to any legal wrong and that appellant therefore did not have the legal right to institute an independent suit to set aside the Commission's order; that inasmuch as the order did not require the carriers

to establish any rates whatsoever, and as the rates now in effect were established by the carriers as a result of their voluntary action and not pursuant to any order of the Commission requiring their establishment, and may not be changed except after a hearing before the Commission, the case presented by appellant has become moot; that the findings and order of the Commission are, furthermore, negative in substance and may not be judicially reviewed in any court.

These interveners further submit that the findings and order of the Commission in this case do not sanction a violation of Section 500 of the Transportation Act of 1920; that the Commission in passing upon the issues construed and applied the Interstate Commerce Act in the light of the declaration of policy contained in Section 500; that the rates that the Commission found the carriers had justified are reasonable and compensatory; that the findings and order do not sanction a violation of Sections 3 and 4 of the Interstate Commerce Act; and that the denial by the Commission of appellant's motion for a rehearing was not a denial of right.

The decree of the court below was right and should be affirmed.

Respectfully submitted,

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March 31, 1934.

APPENDIX.

Section 1, Paragraph 5 of the Interstate Commerce Act (49 U. S. C., Sec. 1, (5)) provides in part:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *"

Section 3, Paragraph 1 of the Interstate Commerce Act (49 U. S. C., Sec. 3 (1)), reads as follows:

> "(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 4, Paragraph (1) of the Interstate Commerce Act (49 U. S. C. Sec. 4 (1)), reads as follows:

> "Sec. 4. Long and short haul charges; competition with water routes.—(1) *Charges for long and short hauls and on through route.* It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter, but this shall

not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That rates, fares, or charges existing on February 28, 1920, by virtue of orders of the commission or as to which application had theretofore been filed with the commission and not, as of that date, acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the commission."

Section 13, Paragraph (1) of the Interstate Commerce Act (49 U. S. C. Sec. 13 (1)), reads as follows:

"Sec. 13 (*As amended June* 18, 1910, *and February* 28, 1920.) (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of any-

thing done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15, Paragraph 1 of the Interstate Commerce Act (49 U. S. C., Sec. 15 (1)), reads as follows:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever, of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be

the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15, Paragraph 7 of the Interstate Commerce Act (49 U. S. C., Sec. 15 (7)), provides in part that:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it

would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; * * *"